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No. 94-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI, on behalf of themselves and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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12 pp

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require the State of New York to provide indigent mental patients, who challenge their confinement, with a psychiatrist who is available to (1) testify promptly on their behalf if the expert's clinical determinations are favorable to the patient and (2) assist in the preparation and presentation of the patient's case?

2. Whether a delay of six weeks from the time of a request for a hearing until the provision of a constitutionally adequate hearing violates the Due Process Clause of the Fourteenth Amendment?

LIST OF PARTIES

The caption of the case contains the names of all the parties.

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PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Lyle Goetz, Mark Cans and Anna Selletti respectfully request that a writ of *certiorari* issue to review the judgments and opinions entered in this case by the United States Court of Appeals for the Second Circuit on November 28, 1994 and June 10, 1992.

OPINIONS BELOW

The November 28, 1994 opinion of the United States Court of Appeals for the Second Circuit is reported at 41 F. 3d 800 (2d Cir. 1994). It is set forth in the Appendix to this Petition at 1a-11a.

The June 10, 1992 opinion of the Second Circuit is reported at 967 F. 2d 29 (2d Cir. 1992) and is set forth in the Appendix to this Petition at 12a-36a.

The opinion of the United States District Court, dated November 23, 1993, that granted summary judgment to the defendants after remand from the Second Circuit is reported at 838 F. Supp. 136 (S.D.N.Y. 1993) and set forth in the Appendix to this Petition at 37a-48a.

The opinion of the United States District Court, dated July 30, 1991, that initially granted summary judgment to the defendants is reported at 769 F. Supp. 132 (S.D.N.Y. 1991) and set forth in the Appendix to this Petition at 49a-59a.

The opinion for the United States District Court for the Southern District of New York, dated January 12, 1990, that certified this lawsuit as a class action is reported at 728 F. Supp. 995 (S.D.N.Y. 1990) and set forth in the Appendix to this Petition at 60a-79a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered an opinion and judgment in this case on November 28, 1994. The petitioners filed a petition for rehearing containing a suggestion that the action be reheard en banc. On February 2, 1995, the Court of Appeals denied the petitioners' motion. The order denying the motion is set forth in the Appendix at 77a of the Appendix. This petition for a writ of *certiorari* is taken from the November 28, 1994 and June 10, 1992 opinions and judgments of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of the Fourteenth Amendment to the United States Constitution. This lawsuit also involves New York Judiciary Law § 35(4) (McKinney 1983 and Supp. 1995) and New York Mental Hygiene Law § 9.31 (McKinney 1988 and Supp. 1995). The relevant texts of these provisions are set forth at 80a-81a of the Appendix.

STATEMENT OF THE CASE

This case involves two of the most basic elements of due process that arise when the State deprives someone of

his liberty by locking him in a mental hospital: (1) the right to meaningfully challenge one's confinement through the provision of psychiatric assistance; and (2) the right to do so in a timely fashion. This lawsuit is a class action in which the class representatives are individuals who have been involuntarily hospitalized in Dutchess County, New York. They assert that the Fourteenth Amendment confers upon indigent mental patients the right to the appointment of a psychiatrist who is available to (a) testify promptly on the individual's behalf if the court-appointed expert's clinical determinations are favorable to the patient and he wishes to use such testimony, and (b) otherwise assist in the preparation and presentation of the patient's case.

Presently in New York, New York Judiciary Law § 35 governs the appointment of psychiatric experts in retention, *i.e.*, civil commitment, proceedings. The statute authorizes a court to appoint up to two psychiatric experts if a court so chooses. However, the statute sets forth a fee schedule of no more than two hundred dollars per appointment if the court appoints one expert, and three hundred dollars if the court appoints two psychiatrists.

The class representatives assert that the present appointment practice in Dutchess County violates the Due Process Clause in a number of ways. First, appointment is soley within the court's discretion. Second, because the statute authorizes the appointment of an expert witness whose only function is to provide information to the court and testify for either party in the retention proceeding, the court appointed expert fails to provide assistance to the patient in the preparation and presentation of his case. Finally, the provision of expert assistance in Dutchess County violates procedural due process because the appointment process results in a four to six-week delay in

the patient's commitment hearing. Such a delay results from the inability to attract doctors willing to accept court appointments because of the low fee schedule. This delay violates the State's obligation to provide a constitutionally adequate hearing in a timely fashion. This delay also effectively requires a patient to choose between a timely commitment hearing and the opportunity to pursue favorable psychiatric testimony.

Proceedings Below

In December 1988, pursuant to 28 U.S.C. §§ 1331 and 1343(3), petitioner Lyle Goetz, an indigent involuntarily hospitalized patient, filed this lawsuit in the United States District Court, Southern District of New York, on behalf of himself and other involuntarily hospitalized patients in Dutchess County. He sought a declaration that the State's failure to appoint, as of right, a psychiatrist who would provide favorable testimony if the patient's condition warranted such testimony, and otherwise assist in the preparation and presentation of the patient's case, violated the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.[1] While the defendants' motion to dismiss was pending,[2] petitioners Mark Cans and Anna Selletti

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1 Lyle Goetz asserted further that a practice at the hospital to which he was confined in which a non-treating psychiatrist examined patients for the sole purpose of gathering information, which he could use at the patient's commitment proceeding, violated the patient's privilege against self-incrimination. This issue is not before this Court.

2 Mr. Goetz had named as defendants in their official capacities the Chief Administrative Judge of New York State, the Commissioner of the New York State Office of Mental Health, and two local state court judges who presided over retention proceedings in Dutchess County. Subsequently, upon consent, the two local state court judges

moved to intervene and serve as class representatives, raising claims identical to those presented by Mr. Goetz.

The district court (Goettel, J.) denied the defendants' motion to dismiss, granted the motion by Mr. Cans and Ms. Selletti to intervene, and certified this lawsuit as a class action. The class consisted of individuals civilly committed within Dutchess County who will request retention hearings to challenge their confinement and will further request the assistance of an independent psychiatrist. 728 F. Supp. at 1003. In denying the motion to dismiss, the district court held that once the Office of Mental Health ("OMH") sought to retain the plaintiff past the terms of his present commitment, and the plaintiff expressed an intention to seek the appointment of an independent psychiatrist, a ripe controversy existed. 728 F. Supp. at 999.[3]

Subsequently, the district court granted summary judgment to the defendants. The court rejected the plaintiff and intervenors' ("plaintiffs") contention that commitment proceedings are quasi-criminal, as the goals of such proceedings are the care and treatment of the individual. 769 F. Supp. at 135. The court then concluded that the appointment of psychiatric experts as of right would create difficulties in attracting an adequate number of psychiatrists. 769 F. Supp. at 136. In addition, requiring a psychiatrist who believed a patient required in-patient treatment to assist the individual in obtaining his release would create ethical problems for the medical expert. *Id.* Finally, the court

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were removed as defendants.

3 The district court granted the portion of the defendants' motion to dismiss addressing the privilege against self-incrimination claim, holding that because retention proceedings are civil in nature, the privilege did not attach. 728 F. Supp. at 1002.

found that the numerous avenues of review for psychiatric patients under state law lessened the risk of an erroneous deprivation in the absence of the appointment of a psychiatric expert. 769 F. Supp. at 137. Consequently, the district court held that due process does not require the provision of expert psychiatric assistance in commitment proceedings. *Id.*

The Second Circuit reversed in part the decision of the district court. The court first held that except in a limited number of fact specific instances, the Due Process Clause does not require the provision of a psychiatric expert who would provide favorable testimony if the patient's condition warranted and otherwise assist in the preparation and presentation of the patient's case. The court referred to this type of expert as a consulting psychiatrist.

In reaching this decision, the court applied the three-prong criteria set forth *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): (i) the interest of the individual subject to involuntary commitment; (ii) the governmental interest affected by the provision of expert assistance; and (iii) the risk of an erroneous deprivation of the individual's interests in the absence of the additional procedural safeguard and the probable value of the additional safeguard. 967 F. 2d at 33. In assessing these factors, the Second Circuit found that the roles of providing testimony if a patient's clinical condition warrants such testimony and assisting in the preparation and presentation of the patient's case "are not of sufficient import to implicate due process in every proceeding." 967 F. 2d at 34.

In so holding, the court first recognized that "psychiatrists often disagree about the proper diagnosis and treatment of particular patients" and lack the ability to predict a person's dangerousness with any great certainty.

967 F. 2d at 34. However, the court found that while a battle of the experts is often thought to increase the accuracy of a judicial proceeding in the adversary system, civil commitment proceedings are not entirely adversarial because the State provides care to those unable to care for themselves as a result of of mental disability. *Id.* Significantly, the Second Circuit concluded that the appointment of a psychiatric expert will not alter the number of erroneous adjudications. *Id.* at 35.

In assessing the importance of the psychiatric expert, the Second Circuit concluded that the consulting psychiatrist's role of providing favorable testimony of a patient's clinical condition overlaps with the role of a psychiatrist who is available to testify on behalf of either party. The court referred to this type of expert as an independent psychiatrist. The court then held that while due process may require the appointment of a consulting psychiatrist in a limited number of fact-specific cases, as a general rule, the Constitution does not require the appointment of an expert who will assist in the preparation of the patient's case since the patients' counsel can obtain a sufficient level of expertise to satisfy due process. *Id.* However, the Second Circuit determined further that when the State judge determines that independent psychiatric testimony is necessary for a reliable assessment of a patient, the individual's interests in freedom and self-protection implicate due process concerns and the individual should have the right to obtain an independent psychiatrist. 967 F.2d at 36, 37. The Second Circuit then remanded this case for the district court to determine whether the procedures in Dutchess County for appointing an independent psychiatrist satisfy due process.

Judge Newman concurred in the judgment in which he specifically addressed the following language in *Addington v. Texas*, 441 U.S. 418 (1979):

> It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

967 F. 2d at 38 (*quoting* 441 U.S. at 429). Judge Newman emphasized that the statement should not be read to mean that committing a mentally normal person is no worse than releasing a mentally ill person. 967 F. 2d at 39. Because the consequences resulting from a wrongful confinement are worse than the consequences of an erroneous release, and, no matter how much care is exercised, many mentally ill individuals will remain undiagnosed and at liberty, it is better to add one more mentally ill person to the population at large than to institutionalize a non-mentally ill person. *Id.* Judge Newman then opined that the appointment of a consulting psychiatrist will enable the adversary system to function on a more informed basis, leaving it up to the State courts to rule on an individual's challenge to his involuntary hospitalization. 967 F. 2d at 40.

Judge Van Graafeiland dissented from the portion of the opinion that remanded the lawsuit to the district court. He rejected the notion that civil commitment proceedings are adversarial, stating that a patient's attorney must attempt to procure treatment for any client in need. 967 F. 2d at 37. Judge Van Graafeiland further opined that the federal courts are ill-equipped to address such issues as the amount of fees paid to experts in State court proceedings. As such, Judge Van Graafeiland would have either denied all relief without prejudice to the patients raising their claims in State court or abstained from resolution of the questions raised pending a

decision in State court of the issues raised in this lawsuit. 967 F. 2d at 38.

Upon remand, the district court again granted summary judgment to the defendants, rejecting the plaintiffs' assertion that delays of over one month violated due process. The court recognized that the limited number of psychiatrists in Dutchess County, the time it took to complete psychiatric evaluations and the inability to compel psychiatrists to complete their evaluations in a more timely fashion rendered it impracticable to compel the State to provide hearings more promptly when a court appointed an independent psychiatrist. 838 F. Supp. at 141. The court concluded that it lacked the authority to compel the State to raise the fees paid to expert witnesses as to induce them to conduct examinations more expeditiously. The court then held that because of a lack of effective remedial measures, it would not declare a situation unconstitutional. 838 F. Supp. at 141.

On appeal, the Second Circuit affirmed the judgment of the district court. Although the Second Circuit recognized that the State court system utilized only one psychiatrist for all its appointments, and the use of only one expert delayed proceedings four to six weeks, 41 F. 3d at 803, 804, it found that the delays did not violate due process because such confinement did not involve "a massive curtailment of liberty." 41 F. 3d at 804. The court then recognized that the delays resulting from the appointment of an independent psychiatrist are directly related to the limited number of psychiatrists in Dutchess County and the time constraints resulting from their other professional obligations. 41 F. 3d at 804. The court ruled that because the plaintiffs failed to establish that there were additional psychiatrists who were available to accept

assignment, and otherwise come forth with a practical remedy for the delays in Dutchess County, there was no due process violation. 41 F. 3d at 804-805.

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE SECOND CIRCUIT SIGNIFICANTLY LIMITING THE PROVISION OF PSYCHIATRIC ASSISTANCE AT CIVIL COMMITMENT HEARINGS RAISE ISSUES OF FUNDAMENTAL IMPORTANCE AND ARE ARGUABLY AT ODDS WITH PRIOR DECISIONS OF THIS COURT.

This Court has recognized that "for the ordinary citizen, commitment to a mental hospital produces `a massive curtailment of liberty,'...[that]... `requires due process protection.'" *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) (*cites omitted*). To date, this Court has addressed the question of the appropriate burden of proof in civil commitment proceedings, *see Addington v. Texas*, 441 U.S. 418 (1979), and the applicability of the privilege against self-incrimination in sexual delinquency proceedings. *See Allen v. Illinois*, 478 U.S. 364 (1986). However, this Court has never delineated fully the scope of procedural protections that the State must afford involuntarily hospitalized patients as to enable them to challenge their confinement in a meaningful time and manner, *see Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), and lessen the risk of an erroneous deprivation of liberty. *See Mathews v. Eldridge* 424 U.S. 319, 335 (1976). Specifically, this Court has never resolved the extent to, and the manner in which, the State must provide independent psychiatric assistance to individuals facing civil commitment.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that, because of the pivotal role played by a psychiatric expert when a criminal defendant raises an issue of his sanity, due process requires the provision of psychiatric assistance when the defendant demonstrates that his sanity at the time of the offense will be a significant factor at trial. 470 U.S. at 83. This appeal presents this Court with an opportunity to resolve the question of the applicability of *Ake* to civil commitment hearings. This lawsuit also provides an appropriate opportunity for this Court to set forth a framework for due process analysis in the civil commitment context and examine the scope of procedural protections required by the Fourteenth Amendment. As such, it raises questions of fundamental importance to hundreds of thousands of individuals deemed mentally ill and dangerous whom State and local governments subject to involuntary hospitalization.[4]

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[4] The latest figures compiled by the federal government detail that in 1986 state and county psychiatric hospitals involuntarily hospitalized 211,566 individuals. In the last year for which statistics have been compiled, a total of 414,349 people were hospitalized in State and county hospitals, private psychiatric hospitals, multi-service facilities and psychiatric wards of general hospitals. Unpublished Data, Center for Mental Health Services, 1986 Client/Patient Sample Survey of Inpatient, Outpatient & Partial Care Programs. These figures are consistent with the latest published data from the federal government that details that in 1983, approximately 351,000 individuals were hospitalized at state and county mental hospitals, averaging 116 days per patient per year. Center for Mental Health Services, *Mental Health, United States, 1994* at 49 (1994). As far back as 1972, this Court noted that considering the number of individuals involuntarily hospitalized, it was "perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." *Jackson v. Indiana*, 406 U.S. 715, 737 (1972).

The Critical Role Played by the Psychiatric Expert in Civil Commitment Proceedings Warrants a Determination of the Applicability of the Provision of Expert Assistance as of Right.

When the State brings its judicial power to bear on an indigent individual in a proceeding in which his liberty is at stake, due process requires that the individual be given a fair opportunity to present his defense. *Ake v. Oklahoma*, 470 U.S. at 76. This principle of meaningful participation has been extended beyond the criminal realm to "quasi-criminal" proceedings. *Id.* at 76.

Because of the medical nature of civil commitment hearings, meaningful participation requires utilization of psychiatric experts: "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. at 429 (emphasis in original).[5]

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5 Numerous scholars have recognized the substantial correlation between expert opinions and judicial dispositions. *See* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 So. Cal. L. Rev. 527, 536, n. 16 (1978) (concordance rate, *i.e.*, rate of correlation, between psychiatric opinions and ultimate legal disposition is "extraordinarily high"); Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 147, n. 182 (1984) (three studies find concordance rate between judicial disposition and psychiatric opinions to be 100% when a violent act was predicted, 100%, and 96%); Hiday, *Judicial Decisions in Civil Commitment: Facts, Attitudes and Psychiatric Recommendations*, 17 Law & Society Review 517, 526-527 (1983) (both underlying facts and psychiatric opinion "significantly influence" court decisions in civil commitment cases). One scholar has concluded that courts often defer to psychiatric opinion even when a preponderance of the evidence indicates that the opinion is unsubstantiated: informal conversations with judges and attorneys suggest that they defer to psychiatric opinion

However, psychiatry is not an exact science and psychiatrists disagree widely and frequently about what constitutes mental illness and the likelihood of future dangerousness. *Ake*, 470 U.S. at 81. Because of the medical nature of commitment hearings and the fallibility and uncertainty of psychiatric diagnoses, *see Addington v. Texas*, 441 U.S. at 429, a court appointed psychiatric expert serves numerous important functions.

First, the psychiatrist serves as an expert witness. Unlike a lay witness, the psychiatrist can identify the "`elusive and often deceptive' symptoms" of mental illness. *Ake*, 470 U.S. at 80 (*cites omitted*). The expert analyzes facts, draws appropriate conclusions, and presents information in a form that provides meaning for the factfinder. *Ake*, 470 U.S. at 80. The expert is also able to uncover and take into account the well-recognized "shortcomings" in the prediction of dangerousness. *Ake*, 470 U.S. at 84.

In addition to serving as a witness, the expert can assist the preparation of the cross-examination of the State's psychiatric witness. *Ake*, 470 U.S. at 82. Psychiatrists "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." 470 U.S. at 80. Accordingly, because of the dominant role of psychiatry in commitment hearings, just as when a mentally ill defendant raises the insanity defense, a civil committee's case "may be devastated by the absence of psychiatric testimony," while the provision of expert assistance dramatically enhances the potential accuracy of a

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because they feel they lack the requisite expertise and want to obtain help for those in need. Hiday, *Reformed Commitment Procedures: An Empirical Study in the Courtroom*, 11 Law & Society Review 651, 665 (1977).

factfinder's determination. *Ake*, 470 U.S. at 83. Indeed, because commitment hearings involve medical issues, "a person possessing . . . [psychiatric] qualifications normally would be preferred" to the assistance provided by an attorney. *Vitek v. Jones*, 445 U.S. at 500 (Powell, J. concurring); *see also Proctor v. Harris*, 413 F. 2d 383, 389 (D.C.Cir. 1969) (Bazelon, C.J. concurring) ("if an indigent patient needs and is entitled to a lawyer, far more may he also need the assistance of a psychiatrist in the presentation of his case"). Indeed, just as this Court recognized that utilization of lawyers in criminal proceedings indicated that they are "necessities, not luxuries," *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the same holds true for psychiatrists in the civil commitment context.

In reaching its initial decision, the Second Circuit ignored the critical roles played by psychiatric experts and rested its opinion upon premises that directly conflict with case law from this Court. First, the Second Circuit ignored this Court's determination in *Ake* that the provision of a psychiatric expert will enhance the accuracy of the factfinding process. *See* 470 U.S. at 83. Instead, the Court of Appeals concluded that "the testimony of consulting psychiatrists may not alter the number of erroneous adjudications," but would simply lessen the number of erroneous confinements while increasing the number of erroneous releases of mentally ill patients. 967 F. 2d at 35. The Court of Appeals also concluded that while the adversary system "tolerates and sometimes requires a `battle of the experts' because it is thought to increase the accuracy of a trial's outcome," 967 F.2d at 34, civil commitment proceedings are not entirely adverse because the State seeks to provide care to mentally ill individuals. 967 F.2d at 34-35. In so holding, the Court of Appeals ignored this Court's pronouncement that "[i]t is precisely `[t]he subtleties and

nuances of psychiatric diagnoses' that justify the requirement of adversary hearings." *Vitek v. Jones*, 445 U.S. at 496 (*citing Addington v. Texas*, 441 U. S. at 430).

The Court of Appeals also failed to recognize the crucial role psychiatrists can play in the preparation of an individual's case, particularly in the development of "probative questions to ask the opposing party's psychiatrists" and the interpretation of their answers. *Ake*, 470 U.S. at 80. Without citing any legal or other authority, the Court concluded that the patient's counsel will gain a sufficient level of expertise about psychiatric matters as to satisfy due process. 967 F. 2d at 35.

The Second Circuit's decision resulted from (1) the court's failure to reconcile two competing strains of case law from this Court and (2) the absence of case law from this Court that addresses the scope of procedural protections that are designed to enhance the reliability of the commitment process.[6] On one hand, this Court has recognized that "any deprivation of liberty is a serious matter. . . [and]. . .is different in kind" than other deprivations. *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *see also Addington v. Texas*, 441 U.S. at 428 (erroneous commitment sometimes as undesirable as an erroneous conviction); *Lassiter v. Department of Social Services*, 452 U.S. 18, 25 (1981) (individual interest in personal freedom triggers right to counsel); *Gagnon v. Scarpelli*, 411 U.S. 778, 789, n.12 (1973) (individual facing loss of an absolute

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6 This Court's decision in *Addington v. Texas, supra,* addressed the allocation of the risk of error in the commitment process. 441 U.S. at 423. In *Allen v. Illinois, supra,* this Court assessed the applicability of the privilege against self-incrimination, a right designed to foster an accusatory system of justice and not enhance the reliability of the process at hand. 478 U.S. at 375.

liberty interest differently situated from already-convicted probationer or parolee and is entitled to a higher degree of protection).

On the other hand, this Court has distinguished commitment proceedings from criminal trials as the state seeks to treat those in need instead of punishing them. *See Allen v. Illinois*, 478 U.S. at 372-73. The Second Circuit emphasized this distinction by concluding that civil commitment proceedings are not entirely adverse because the state seeks to provide care to mentally ill individuals. 967 F. 2d at 34. In so holding, the court rejected the relevance to civil commitment proceedings of this Court's recognition that expert testimony from both sides will enable a factfinder to render its most accurate decision. 967 F.2d at 34 (*citing Ake v. Oklahoma*, 470 U.S. at 81).

The failure of the Second Circuit to recognize that the provision of expert assistance will enhance the reliability of the commitment process necessarily impacted upon its analysis of the three-prong *Mathews* test in an additional way. A recognition that expert assistance will increase the reliability of commitment hearings results in a determination that such assistance will further the governmental interest in limiting its costly mental health facilities to cases of genuine need. *Parham v. J.R.*, 442 U.S. 584, 604-05 (1979); *see also* Lipton & Simon, *Psychiatric Diagnosis in a State Hospital: Manhattan State Revisited*, 36 Hosp. & Comm. Psych. 368, 372 (1985) (more accurate psychiatric assessments can result in savings of $40,000 per patient annually).

In sum, the Second Circuit failed to recognize both that the provision of expert testimony will enhance the accuracy of commitment proceeding and a deprivation of liberty triggers procedural protections that ordinarily would

not be required. Such failure, together with the absence of case law from this Court setting forth relevant considerations to apply when assessing the applicability to civil commitment hearings of procedural protections designed to enhance the reliablity of the civil commitment process, resulted in the Second Circuit framing its decision around the principle that "`[i]t cannot be said. . .that it is much better for a mentally ill person to `go free' than for a mentally normal person to be committed.'" 967 F. 2d at 35 (*quoting Addington v. Texas*, 441 U.S. at 429). While such a focus is appropriate when determining how the risk of error should be allocated in a commitment proceeding, *Addington*, 441 U.S. at 423, the Second Circuit should have attempted to ensure that "an erroneous confinement should be avoided in the first instance." *Addington*, 441 U.S. at 428.

The Second Circuit's emphasis on the non-adversarial nature of commitment proceedings also resulted in the court failing to recognize that the State must afford a litigant with an "opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma*, 470 U.S. at 76. This right to meaningful participation also applies to proceedings that are "quasi-criminal." 470 U.S. 76. There can be little doubt that commitment proceedings are quasi-criminal as the patient faces a loss of liberty as state involvement "undeniably pervade[s]" the proceeding. *Little v. Streater*, 452 U.S. 1, 9 (1981). The failure to address the concept of meaningful participation resulted in the Second Circuit focusing on the reliability of the ultimate decision to confine by incorporating into its due process analysis such factors as the multiple opportunities for patients to obtain release. *See* 967 F. 2d at 35. Such analysis shifts the focus of the due process analysis away from the opportunity to meaningfully

challenge one's confinement to likely accuracy of the initial decision to confine. Under such focus, the greater number of procedural protections the State affords a patient prior to a commitment hearing, the less protections the State must afford him at the hearing. This focus shifts the ultimate responsibility to ensure that there has been no erroneous deprivation of liberty from a legal factfinder to the governmental officials who make the decision to confine in the first instance.[7]

The Second Circuit's failure to recognize the importance of an individual's liberty interest also resulted in the court minimizing the assistance that a psychiatric expert can play in his role as a consultant and elevating possible ethical concerns for the court-appointed witness. 967 F. 2d at 35 ("providing assistance in trial strategy might pose a dilemma for a psychiatrist whose

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7 The Second Circuit's view of the utility of a court-appointed psychiatric expert differs greatly from the other courts and commentators that have examined the issue. As the court found in *In re Gannon*, 301 A. 2d 493 (N.J. Super. 1973), "[n]o matter how brilliant the lawyer may be, he is no position to effectively contest the commitment proceedings because he has no way to rebut the testimony of the psychiatrist from the institution...In a commitment proceeding where the court is in effect bound by the expertise of the psychiatrist, the right to counsel is of little value without a concurrent right to an independent psychiatric examination. 301 A. 2d at 494; *see also In re Williams*, 478 N.E. 2d 867, 869 (Ill. App. 1985) (rights to counsel and hearing will often fail to protect patient unless he is able to secure advice or testimony of own examiner); *Legal Issues in State Mental Health Care: Proposals for Change-Civil Commitment*, 2 Ment. & Phys. Dis. L. Rep. 75, 104 (1977) (rights to counsel and hearing are hollow without resort to examination and testimony from mental health professional); Farrell, *The Right of an Indigent Civil Commitment Defendant to Psychiatric Assistance of His Own Choice at State Expense*, 11 Idaho L. Rev. 141 (1975) (due process requires provision of psychiatric assistance at civil commitment hearings).

professional judgment favored commitment"). Not only does a concern over medical ethics trivialize a patient's interest in liberty, but such concern is unwarranted because as long as an expert provides truthful information, any assistance is ethically permissible. Appelbaum, *In Wake of Ake: The Ethics of Expert Testimony in an Advocate's World*, 15 Bull. Am. Acad. Psychiatry & Law, 15, 24 (1987).

Finally, by limiting even the provision of independent psychiatric testimony to cases in which a court deems it necessary for a reliable assessment of the patient, the Second Circuit placed patients in a tenuous position. Because of the nuances, subtleties, and uncertainties of psychiatric diagnoses, *see Addington v. Texas*, 441 U.S. at 429-30, patients may lack the ability to establish the necessity of an independent psychiatric evaluation for a reliable assessment without the appointment of the medical expert in the first place.

For all these reasons the decision of the Second Circuit raises issues of utmost importance to every mental patient confined against his will. This Court should grant *certiorari* in order to clarify the scope of procedural protections a State must afford an individual who suffers the massive curtailment of liberty that civil commitment entails.

This Case Raises Significant Legal and Practical Questions Regarding the Right to a Prompt Hearing to Challenge One's Involuntary Hospitalization.

I

In its opinion, the Second Circuit recognized that the Constitution requires the provision of an independent psychiatrist when a court determines it is necessary for a reliable assessment of the patient. However, the court permitted the State to delay the hearing from four to six weeks when a court appoints an independent psychiatrist. 41 F. 3d at 803, 804. In so holding, the Second Circuit failed to recognize that when the State deprives an individual of liberty, any pre-hearing deprivation must be as brief as possible and may not be lengthened by delays that are avoidable. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 55 (1991).

When the State incarcerates an individual, it must accommodate competing concerns. On one hand, states have a strong interest in maintaining public safety, *County of Riverside v. McLaughlin*, 550 U.S. at 52, which includes incarcerating mentally ill individuals deemed to pose a danger to themselves or others. *See e.g., O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975); *Jones v. United States*, 463 U.S. 354, 368 (1983). On the other hand, prolonged confinement, whether in jail or a psychiatric hospital, for even a brief period of time, has adverse consequences such as imperiling one's job, interrupting one's source of income and impairing one's family relationships. *County of Riverside*, 500 U.S. at 52; *see also Parham v. J.R.*, 442 U.S. at 626 (Brennan, J., concurring in part and dissenting in part).

This Court has never delineated a constitutionally acceptable time frame for a commitment hearing. This has resulted in a problem similar to that which this Court sought to resolve in *County of Riverside*. Just as this Court's admonition that probable cause determinations be "prompt" led to a "flurry of systemic challenges to city and county practices," 500 U.S. at 56, the absence of any case law from this Court setting forth an acceptable time frame for commitment hearings that lower courts could apply has led to federal courts attempting ad hoc to assess what constitutes a "reasonable" period of confinement pending a hearing. These cases have resulted in courts arbitrarily deeming a wide range of time periods constitutionally permissible or setting forth time limitations for the provision of hearings when courts have found State statutes unconstitutional. *See Project Release v. Prevost*, 722 F. 2d 960, 975 (2d Cir. 1983) (hearing within five days without a probable cause determination satisfies due process because of other procedural protections within State commitment statute); *French v. Blackburn*, 428 F. Supp. 1351, 1355 (M.D.N.C. 1977) (three-judge court), *aff'd*, 443 U.S. 901 (1977) (ten day custody prior to full adversary hearing constitutional; no probable cause hearing required); *Coll v. Hyland*, 411 F. Supp. 905, 910-11 (D.N.J. 1976) (three-judge court) (twenty day period of confinement without a hearing constitutional); *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D.Neb. 1975) (three-judge court) (full hearing within fourteen days; prelimimary hearing within five days of admission); *Kendall v. True*, 391 F. Supp. 413, 419 (W.D.Ky. 1975) (three-judge court) (hearing required within twenty-one days of hospitalization; probable cause hearing required earlier); *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D.Ala. 1974) (three-judge court) (full hearing within thirty days of confinement; probable cause hearing within seven days of confinement); *Bell v. Wayne County*

General Hospital, 384 F. Supp. 1085, 1098 (E.D.Mich. 1974) (three-judge court) ("prompt" preliminary hearing required; five day limitation on confinement without hearing appears "appropriate"); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091-92 (E.D.Wisc. 1972) (three-judge court), *vacated and remanded*, 414 U.S. 473, *on remand*, 379 F. Supp.1376 (E.D.Wisc 1974), *vacated and remanded*. 421 U.S. 957, *reinstated*, 413 F. Supp. 1318 (E.D.Wisc .976) (full hearing required within ten to fourteen days of detention; preliminary hearing within forty-eight hours); *Logan v. Arafeh*, 346 F. Supp. 1265, 1268-1269 (1972) (three-judge court), *aff'd. sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973) (forty-five day confinement without a hearing permissible).[8]

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8 Furthermore, the Court's summary affirmance in *Briggs v. Arafeh* may have inappropriately resulted in at least two three-judge courts placing undue reliance upon the opinion. The courts in both *Coll v. Hyland* and *French v. Blackburn* cited this Court's summary affirmance of *Logan v.Arafeh* and *Hicks v. Miranda*, 422 U.S. 332 (1975), in which this Court held that a summary affirmance is binding precedent, to conclude that this Court has determined that a forty-five day confinement without a hearing is not unreasonable. *See French v. Blackburn*, 428 F. Supp. at 1356; *Coll v. Hyland*, 411 F. Supp. at 910. However, since these lower court opinions, this Court has made clear that a summary affirmance has "considerably less precedential value than an opinion on the merits." *Illinois State Board of Elections v. Socialist Workers Party*, 422 U.S. 173, 180-81 (1979). *See also Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476-78 n.20 (1979) (summary affirmance "represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not. . .necessarily reflect our agreement with the opinion of the court whose judgment is appealed"); *Mandel v. Bradley*, 432 U.S. 173, 175 (1977) ("rationale of the affirmance may not be gleaned solely from the opinion below"). Moreover, this Court decided *Briggs* prior to its decisions in *O'Connor v. Donaldson*, *supra*, and *Addington v. Texas*, *supra*, in which this Court first placed

II

Admittedly, the Constitution does not require the State to provide a hearing sooner than is administratively feasible. *See County of Riverside*, 500 U.S. at 253-54; *Lessard v. Schmidt*, 349 F. Supp. at 1092 (full hearing as soon after detention as possible while permitting psychiatrists to conduct examinations and prepare reports and patients to prepare defense); *Developments in the Law - Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1281 (1974) (hearing as soon as possible while permitting full diagnostic assessment of patient). However, this Court has clearly indicated that the need for "flexibility has its limits." *County of Riverside*, 500 U.S. at 55.

In its opinion, the court below inappropriately trivialized the harm suffered by involuntarily confined mental patients and unnecessarily deferred to administrative concerns of the State. The Second Circuit first concluded that a delay of two to four weeks does not amount to a "massive curtailment of liberty." 41 F. 3d at 804. The Circuit then ignored the fact that other counties within New York conducted hearings within one to two weeks of a psychiatric appointment. *See* 41 F. 3d at 804. Without pointing to factual support in the record, the Circuit attributed the ability of some counties to conduct hearings one to three times more promptly on both the concentration of psychiatrists in the particular counties and their under-utilization by the court systems within each particular county. *See id.*[9] In so holding, the Second

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limitations upon a state's authority to civilly commit mentally ill individuals because of the significant deprivations suffered by a confined mental patient.

9 In relying on local demographics as a basis for its due process

Circuit reached a decision at odds not only with at least the three-judge district courts in *Lessard v. Schmidt*, *Doremus v. Farrell*, and *Kendall v. True*, but also with well-recognized authority that has attempted to balance the competing concerns of individual liberty and the need for the state to provide treatment to those in need. *See* National Center for State Courts, *Guidelines for Involuntary Civil Commitment*, 10 Ment. & Phys. Dis. L. Rep. 409, 480 (1986) (hearing within three days of confinement); Stromberg & Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 Harv. J. Legis. 275, 337 (1983) (hearing within three days for hospitalized individuals).

Ultimately, the Second Circuit permitted the four to six week delays because the patients failed to come forth with practical remedies for the delays. *See* 41 F. 3d at 804. In so holding, the Second Circuit ignored two well-settled principles of consititutional law. First, the Second Circuit ignored the firmly established distinction between a constitutional violation and the remedy needed to correct it. *See e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). Indeed, this Court's decision in *County of Riverside* establishes that there is no great difficulty in fashioning equitable relief once a constitutional violation has been found to exist. Second, by forcing patients to choose between a hearing within five

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analysis, the Second Circuit's opinion is reminiscent of arguments raised when this Court addressed the question of the right to counsel in *Gideon v. Wainwright, supra. See Amicus Curiae* Brief for the State of Alabama at 13 ("it is not an uncommon situation in thinly populated rural counties for there to be more persons charged with crime than there are lawyers versed in criminal practice; and some judges may encounter real difficulty in appointing enough qualified lawyers").

days under Mental Hygiene Law § 9.31 and waiting four to six weeks if they seek, and a court appoints, an independent psychiatrist, the Second Circuit permitted the State to compel patients to choose between a prompt hearing and independent psychiatric testimony. However, it is well-settled that the government may not condition the exercise of a right or privilege upon the forfeiture of another right or privilege. *See e.g., Dolan v. City of Tigard*, _ U.S._, _, 114 S. Ct. 2309, 2318 (1994); *Thomas v. Review Board of Indiana Employment Sec.*, 450 U.S. 707, 716-717 (1981).

CONCLUSION

For the reasons set forth in this petition, the petition for *certiorari* should be granted.

Dated: Huntington, New York
June 14, 1995

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1630—August Term, 1993

(Argued: June 6, 1994 Decided: November 28, 1994)

Docket No. 93-9357

LYLE R. GOETZ, individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

MARK CANS and ANNA SELLETTI, individually, and on behalf of all others similarly situated,

Intervenors-Appellants,

—v.—

THE HONORABLE MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Defendants-Appellees.

Before:

WINTER and WALKER, *Circuit Judges*,
and POLLACK, *District Judge.**

Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York (Goettel, *Judge*) granting summary judgment to the defendants. Appellants—involuntary patients in state mental institutions—argue that the procedures by which independent psychiatrists are appointed in involuntary commitment or retention proceedings in Dutchess County violate due process. Appellants further argue that the district court abused its discretion by restricting discovery.

Affirmed.

WILLIAM M. BROOKS, Mental Disability Law Clinic, Touro College, Huntington, New York, *for Plaintiff-Appellant and Intervenors-Appellants.*

BARBARA K. HATHAWAY, Assistant Attorney General of the State of New York (G. Oliver Koppell, Attorney General of the State of New York), *for Defendants-Appellees.*

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* The Honorable Milton Pollack, United States District Judge for the Southern District of New York, sitting by designation.

WINTER, *Circuit Judge*:

A class of involuntarily committed patients in New York State mental hospitals appeals from Judge Goettel's decision that New York's procedures for the appointment of independent psychiatrists in involuntary commitment or retention hearings, as applied in Dutchess County, comport with due process. The members of the class also challenge a discovery order of the district court. We affirm.

BACKGROUND

This action is before us for the second time. *See Goetz v. Crosson*, 967 F.2d 29 (2d Cir. 1992) ("*Goetz I*"). In the first appeal, we addressed appellants' claim that, *inter alia*, the Constitution required the State of New York to provide a psychiatrist to aid counsel to, and perhaps testify for, indigent persons subject to involuntary commitment or retention proceedings. We held that there is no constitutional right to the aid of such a psychiatrist in such proceedings. *Id.* at 34-35. However, we remanded for consideration of whether, if a judge presiding over an involuntary commitment or retention hearing determines that an independent psychiatrist's testimony is needed, New York's procedures—as applied in Dutchess County—for the appointment of such an independent psychiatrist meet constitutional standards. *Id.* at 36-37. We defined an independent psychiatrist as one "unassociated with the state, who will examine the patient and testify as to the need for institutionalization . . . regardless of whether the testimony supports or rejects commitment or retention. Such a psychiatrist also has no obligation to provide any other assistance to the patient or the patient's counsel." *Id.* at 31 n.1. The district court

thereafter held that the procedures did not violate the Constitution. *Goetz v. Crosson*, 838 F. Supp. 136 (S.D.N.Y. 1993). We assume familiarity with our prior decision.

We briefly set out the legal context in which the issues before us arose. Due process requirements impose two conditions that must be proven by clear and convincing evidence to commit or retain a person involuntarily. First, the person must be mentally ill and require involuntary treatment. Second, the person must pose a "substantial" threat of physical harm either to himself or others. These conditions are incorporated in the New York Mental Hygiene Law that governs involuntary civil commitment. N.Y. Mental Hyg. Law §§ 9.27-9.39 (McKinney 1988). The details concerning the procedures for commitment and retention are set out in our prior opinion. *Goetz I*, 967 F.2d at 31-32.

Before commitment, an involuntary patient is generally examined by at least two psychiatrists who must determine that the patient meets the requisite conditions. Following commitment, an involuntary patient has access to an elaborate process governing retention. Initially, a patient can be retained without court order for only sixty days. Subsequent orders for six months and thereafter one year may be obtained. The patient may request a hearing before a court to review a commitment and/or retention. Throughout these extensive proceedings, the patient has a right to counsel. If the patient cannot afford representation, then the court may appoint counsel. N.Y. Jud. Law § 35(1)(a) (McKinney 1983).

The court may appoint one or two psychiatrists to examine the patient and testify at commitment or retention hearings. These psychiatrists must give independent

opinions and may not be associated with the state. *Goetz I*, 967 F.2d at 31. As noted, we have referred to psychiatrists so appointed as "independent psychiatrists." *Id.* Independent psychiatrists are reimbursed for expenses and receive compensation. The statute specifies a maximum expenditure on compensation of $200 for one psychiatrist and $300 for two, but it also gives the court the authority to exceed these limits in "extraordinary circumstances." N.Y. Jud. Law § 35(4) (McKinney 1983).

Appellants assert that the appointment of an independent psychiatrist in Dutchess County delays the retention proceeding by four to six weeks due to (i) the fact that there is only one physician on the Dutchess County panel that provides independent psychiatrists and (ii) the low fees paid to independent psychiatrists.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must demonstrate that (i) there are no genuine issues of material fact and (ii) the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a grant of summary judgment, (i) we examine the record *de novo* and (ii) we also view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See, e.g., Goetz I*, 967 F.2d at 33; *Dube v. State Univ. of New York*, 900 F.2d 587, 597 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991).

Involuntary civil commitment proceedings result in a significant deprivation of liberty and therefore must satisfy due process. *Addington v. Texas*, 441 U.S. 418, 425

(1979); *see also Vitek v. Jones*, 445 U.S. 480, 491-92 (1980). The three-pronged balancing test enunciated by Justice Powell in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), provides guidance in determining whether delay in provision of an independent psychiatric evaluation, when required, comports with due process. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). The three factors are: (i) the interests of the patient in question that such procedures affect; (ii) the probable value of additional procedural safeguards, along with the possibility of erroneous deprivation of the patient's interests without such safeguards; and (iii) the governmental interests—including fiscal and administrative burdens—implicated by additional procedural safeguards. *See, e.g., id.*; *Mathews*, 424 U.S. at 335.

As to the first factor, the patient has a liberty interest implicated by the procedures used to appoint an independent psychiatrist. Involuntary commitment to a psychiatric facility is obviously a significant restriction on an individual's liberty. *Vitek*, 445 U.S. at 491-92; *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Goetz I*, 967 F.2d at 33. In addition to the effects of the actual confinement, involuntary civil commitment upon a finding of dangerousness can damage an individual's reputation. *Addington*, 441 U.S. at 425-26; *Goetz I*, 967 F.2d at 33. The patient also has a financial interest at stake because the Department of Mental Hygiene can levy charges for care and treatment. *Goetz I*, 967 F.2d at 33.

Regarding the second *Mathews* factor—the probable value of the additional safeguards in question and possibility of an erroneous deprivation—a more prompt examination and report by an independent psychiatrist could have some value because it might in some cases prevent an erroneous deprivation. The value, of course,

would result from the reduced time that erroneously committed patients would spend in the facility. This time implicates the liberty, financial, and reputational interests of erroneously committed patients.

The damage to the patient's interests is limited, however, and does not involve the "massive curtailment of liberty" at issue in *Vitek*, *Humphrey*, and *Addington*. Appellants concede that a delay of two weeks would not violate any constitutional standard. At the outside, therefore, the damage to patients' interests involves a delay of two to four weeks in getting a hearing with the benefit of an assessment by an independent psychiatrist. Because there is no constitutional requirement of such an assessment, the damage to the patient's interests is limited to those cases in which the presiding judge desires the aid of an independent psychiatrist. *Goetz I*, 967 F.2d at 36. Moreover, the patients in question have already been examined by two psychiatrists, a procedure that clearly reduces the chances of an erroneous deprivation.

We believe the third *Mathews* factor is decisive. At bottom, swiftness or delay in obtaining the services of an independent psychiatrist is the result of the size of the pool of available psychiatrists in the geographic area who are not associated with the state and thus have a practice outside the institution in which the particular patient is confined. Such a practice will generally entail professional obligations, such as appointments with regular patients, that may preclude an immediate response to a request from a presiding judge in a commitment or retention hearing.

The delay of which appellants complain is thus directly related to the number of psychiatrists in or near Dutchess County who are not associated with the state.

Some of the psychiatrists in Dutchess County are associated with a state-run facility and thus are not suitable to serve as an independent psychiatrist. Those who are suitable generally have obligations that preclude them from acting immediately upon a request to serve as an independent psychiatrist.[1] Appellants suggest that the $200 payment for an independent psychiatric assessment is too low and a cause of the delay. However, the presiding judge has discretion to pay more when he or she believes it necessary, and the record reflects that payments in excess of $200 are made. At least one payment in excess of $1,000 is in the record. Moreover, the record does not support the conclusion that greater fees would eliminate the delay.

Appellants' benchmark for a constitutionally timely access to independent psychiatrists is Manhattan and the Bronx—where the delay is said to consist of one to two weeks. Because the procedures do not vary between counties, there is either a greater concentration, or less likely, greater underutilization, of psychiatrists in Manhattan and the Bronx than in Dutchess County. However, we do not believe that constitutional standards fashioned under *Mathews* are governed by the demographics of regions other than those in which the confinement or retention hearing is actually held. The third *Mathews* factor requires a hard look at the realities of

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[1] Appellants note that psychiatric reports in competency hearings for criminal defendants, *see* N.Y. Crim. Proc. Law §§ 730.10–730.70 (McKinney 1984), can be obtained more swiftly than in confinement hearings. However, the issues in a competency hearing—ability to understand the charges and participate in one's defense, *id.* § 730.10(1)—seem far less complex and more quickly resolved than the issues in a confinement hearing—danger to oneself or to others. Whereas the former issues may generally be resolved simply by interviewing the defendant, the latter issues generally require interviews of institution staff, friends of the patient, and relatives.

the case at hand, not a comparison to best-case scenarios.

What is lacking in appellants' arguments are practical remedies for the delay resulting from the number of psychiatrists available in Dutchess County. Appellants do not offer any credible evidence that additional psychiatrists, as yet unidentified, are available to conduct independent evaluations within Dutchess County. It would be possible, although quite expensive, for the state to retain psychiatrists on a stand-by basis—for example, to keep one day a week open—in case such an examination and report were requested. However, the independence of such a psychiatrist would be open to serious challenge because he or she would be receiving, and perhaps would be dependent upon, substantial amounts of money from the state for essentially no work. Indeed, one of the causes of the present litigation is appellants' suspicion that psychiatrists associated with the state harbor a preference for confinement. A psychiatrist retained by the state to be available at short notice would hardly escape a similar suspicion.

The state might also pay psychiatrists to commute from New York City to examine and report on a patient in Dutchess County. However, this remedy would be very expensive because commuting to Dutchess County to conduct an examination of the patient and interviews of others would require the absence of the physician from his or her regular office for at least a day—and perhaps days. The remedy thus also assumes the availability of psychiatrists who always have upcoming days entirely without appointments. The record does not support the proposition that such psychiatrists are regularly available, or that, if available, they would be suitable consultants. Moreover, a psychiatrist with the required

flexibility in scheduling would appear to earn little apart from periodic appointments in Dutchess County and would be deemed dependent upon income as a state-paid independent psychiatrist.[2]

Appellants' final claim is that the restrictions placed by the district court upon discovery constituted error. Discovery rulings are reviewed for abuse of discretion. *See Murphy v. International Business Machs. Corp.*, 23 F.3d 719, 722 (2d Cir. 1994), *cert. denied*, 63 U.S.L.W. 3246 (U.S. Oct. 3, 1994) (No. 94-215); *Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993). A district court abuses its discretion "when the action taken was improvident and affected the substantial rights of the parties." *In re Surety Ass'n of America*, 388 F.2d 412, 414 (2d Cir. 1967) (internal quotation omitted).

We do not believe that the record demonstrates a limitation of appellants' substantial rights. The scope of the remand was to determine the constitutionality of the procedures for appointing an independent psychiatrist "where the presiding judge determines that such testimony [of an independent psychiatrist] is necessary to a reliable assessment of a patient." *Goetz I*, 967 F.2d at 36-37. Therefore, the district court was within its discretion when it limited questioning to "what practical problems the state justices may have encountered in obtaining independent psychiatrists in those cases where they believe one should be appointed."

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[2] Appellants argue that the delay in obtaining the assistance of an independent psychiatrist chills patients in requesting such assistance. This argument applies only to those patients who expect to be discharged before such assistance would be available, and the asserted harm is again the delay in release. We see no need to add to the discussion in the text with regard to this argument.

The disallowance of questions relating to the processes of judicial decision was hardly error. *See Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904). The inner workings of administrative decision making processes are almost never subject to discovery. *See, e.g., United States v. Morgan*, 313 U.S. 409, 422 (1941); *National Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144-45 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); *McGoldrick v. Koch*, 110 F.R.D. 153, 155-56 (S.D.N.Y. 1986). Clearly, the inner workings of decision making by courts are kept in even greater confidence.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 515—August Term, 1991

(Argued: November 15, 1991 Decided: June 10, 1992)

Docket No. 91-7761

LYLE R. GOETZ, individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

MARK CANS and ANNA SELLETTI, individually, and on behalf of all others similarly situated,

Intervenors-Appellants,

—v.—

The Honorable MATTHEW CROSSON, in his official capacity as chief administrator of the courts of New York; and DR. RICHARD C. SURLES, in his official capacity as Commissioner of the New York State Office of Mental Health,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, NEWMAN and WINTER,

Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York (Gerard L. Goettel, *Judge*), granting summary judgment and dismissing appellants' action for a declaratory judgment that the Due Process Clause grants a person subject to involuntary civil commitment or retention proceedings a right to the assistance of a psychiatrist or, in the alternative, a right to the testimony of an independent psychiatrist.

Affirmed in part, reversed in part, and remanded. Judge Van Graafeiland concurs in part and dissents in part in a separate opinion. Judge Newman concurs in a separate opinion.

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WINTER, *Circuit Judge*:

This appeal concerns what sort of psychiatric assistance, if any, a state must provide to indigent individuals subject to involuntary commitment or retention proceedings. Judge Goettel held that New York's procedures governing such commitment or retention were constitutionally sufficient and entered summary judgment against the appellants. We agree with Judge Goettel that the Due Process Clause does not confer on involuntarily committed persons an absolute right to psychiatric assistance at commitment or retention proceedings. However, we cannot exclude the possibility that there are circumstances in which the participation of a psychiatrist unassociated with the state might be constitutionally mandated. Appellants have raised a number of issues of fact concerning the circumstances in which the appointment of such a psychiatrist might be required, and whether, as applied in Dutchess County, New York's procedures for appointing an independent psychiatrist are constitutionally sufficient. We therefore remand for further proceedings consistent with this opinion.

BACKGROUND

Lyle Goetz has been an involuntary patient at the Harlem Valley Psychiatric Center in Dutchess County, New York, since March 21, 1987. In December 1988, Goetz brought the instant class action in the Southern District seeking declaratory relief on three claims, only two

of which remain at issue. *See Goetz v. Crosson*, 728 F. Supp. 995, 1001-03 (S.D.N.Y. 1990) (dismissing appellants' Fifth Amendment claim).

Goetz alleged that New York State fails to provide indigent patients subject to involuntary commitment with constitutionally-required psychiatric assistance. Such assistance is alleged to involve the provision of a psychiatrist to perform two tasks in every commitment or retention hearing: (i) the psychiatrist would testify on behalf of the patient at a commitment or retention hearing "if the psychiatrist believes [the patient's] clinical condition warrants such testimony"; and (ii) the psychiatrist would assist counsel in the preparation of the patient's case, whether or not he or she believed that commitment or retention was appropriate. For purposes of this opinion, we shall style this role as a "consulting psychiatrist." Goetz alleged that New York's failure to provide a consulting psychiatrist in all commitment and retention hearings violates the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Goetz further alleged that New York's existing discretionary procedures for appointing a psychiatrist unassociated with the state to examine the patient and testify as to his or her condition at commitment or retention hearings, *see* N.Y. Jud. Law § 35(4) (McKinney Supp. 1992), do not satisfy the requisites of due process. In this opinion, we shall style such a psychiatrist an "independent psychiatrist."[1]

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1 By independent psychiatrist, we mean a psychiatrist unassociated with the state, who will examine the patient and testify as to the need for institutionalization. Such a psychiatrist will testify at commitment or retention hearings regardless of whether the testimony supports or rejects commitment or retention. Such a psychiatrist also has no obligation to provide any other assistance to the patient or the patient's counsel.

Judge Goettel certified the class, *Goetz*, 728 F. Supp. at 1003-04, and granted motions to intervene by Mark Cans and Anna Selletti, two involuntary patients at the Harlem Valley Psychiatric Center with claims similar to those made by Goetz. *Id.* at 998. In August 1990, appellants moved for summary judgment. Judge Goettel denied this motion, and, notwithstanding the lack of a motion by the state defendants, granted summary judgment against the appellants dismissing their entire complaint. Stating that there were no material issues of fact in dispute, Judge Goettel held that the Due Process Clause did not require the appointment of a consulting psychiatrist. He did not address appellants' claims regarding the appointment of an independent psychiatrist in appropriate cases.

DISCUSSION

A. *New York State's Civil Commitment Procedures*

We begin our analysis with a summary of New York law regarding involuntary civil commitment. There are two prerequisites to involuntary civil commitment, which, as a matter of federal constitutional law, must be proven by clear and convincing evidence. *See generally Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (due process requires at least clear and convincing proof at civil commitment proceedings). First, the subject of the commitment proceedings must be mentally ill and "in need of involuntary care and treatment." N.Y. Mental Hyg. Law § 9.27(a) (McKinney 1988). A person is "in need of involuntary care and treatment" if he or she "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and [his or her] judgment is so impaired that he [or she] is unable to

understand the need for such care and treatment." N.Y. Mental Hyg. Law § 9.01. Second, the subject must "pose[ ] a substantial threat of physical harm" to him or herself or to others. *In re Jeanette S.*, 550 N.Y.S.2d 383, 384 (App. Div. 1990); *see also O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

A subject of a commitment proceeding may be committed to a mental health institution upon the application of a relative or other qualified person and the certification of two examining physicians. Prior to admission, a third physician who is a member of the psychiatric staff of the institution must examine the individual and confirm the need for involuntary care and treatment. N.Y. Mental Hyg. Law § 9.27(e). Alternatively, in cases where a need for immediate in-patient treatment exists and where there is a substantial risk of physical harm to the patient or others because of the patient's mental illness, a director of community services may make an application for involuntary commitment. The subject of such an application may be admitted if a staff physician confirms the need for immediate hospitalization. Within seventy-two hours of admission, a second examining physician must certify that involuntary treatment is appropriate. N.Y. Mental Hyg. Law § 9.37(a). There are also procedures for emergency admission. N.Y. Mental Hyg. Law § 9.39.

No matter what the particular path leading to involuntary commitment, the involuntarily committed patient

thereafter becomes the beneficiary of a rather elaborate procedural scheme for notice, hearing, review, and judicial approval of continued retention in a mental health facility. *See* N.Y. Mental Hyg. Law §§ 9.29-9.35, 9.37(a), 9.39(b). The period of retention without court approval is limited to sixty days.[2] N.Y. Mental Hyg. Law § 9.33(a). At any time during this period the patient may request a hearing on the need for continued commitment. A hearing must be held within five days of such a request after which the court may grant or deny the patient's application for release. N.Y. Mental Hyg. Law § 9.31.

The institution must release the involuntarily committed patient within either thirty days of the denial of an application for release or sixty days after the initial commitment, whichever is later. N.Y. Mental Hyg. Law § 9.33(a). If the staff of the facility believes that the patient needs further institutionalization, they have the burden of obtaining court authorization to retain the involuntary patient. *Id.* The patient may request a hearing to determine whether the court should issue a retention order. The failure to make such a request within five days of receiving written notice of an application for retention may result in the entry of an order of retention without a hearing. *Id.* Such a retention order is effective for six months. N.Y. Mental Hyg. Law § 9.33(b). At the end of six months, the staff of the facility, following the same procedures, may obtain a retention order effective for up to an additional year. N.Y. Mental Hyg. Law § 9.33(d). Subsequently issued retention orders are effective for up to a maximum of two years. *Id.*

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2 Those initially admitted on an emergency basis may be confined for an additional fifteen days. N.Y. Mental Hyg. Law § 9.39(b).

Within thirty days of the issuance of any retention order, the involuntarily committed patient may request a rehearing and review of the order by a judge other than the one who signed the original order. At this stage the patient has the right to a jury trial. N.Y. Mental Hyg. Law § 9.35.

A patient has the right to counsel during all of these proceedings, including counsel paid by the state where the patient cannot afford one, N.Y. Jud. Law § 35(1)(a). In addition, during any retention hearing, the court may appoint up to two independent psychiatrists to examine the patient and testify at the particular hearing. N.Y. Jud. Law § 35(4) (McKinney Supp. 1992). A psychiatrist so appointed may be paid up to $200. If two independent psychiatrists are appointed, their combined compensation is limited to $300. However, the court may, in "extraordinary circumstances" approve compensation in excess of these limits. *Id.*

We upheld New York's involuntary civil commitment procedures when they were challenged as facially unconstitutional in *Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). Appellants, however, raise slightly different issues. They argue that, in addition to New York's existing procedures, due process requires that the state appoint a consulting psychiatrist, as defined *supra*. They also argue that, facially and as applied in Duchess County, New York, Section 35(4) of the New York Judiciary Law fails to satisfy what they identify as a patient's more limited right to the testimony of an independent psychiatrist.

B. *The Right to a Consulting Psychiatrist*

In reviewing a grant of summary judgment, we examine the record *de novo*, and view the evidence in the light

most favorable to the party opposing summary judgment. *See, e.g., Dube v. State University of New York*, 900 F.2d 587, 597 (2d Cir. 1990).

We first examine whether the Due Process Clause requires New York State to provide an indigent involuntary patient with the services of a consulting psychiatrist. The Supreme Court has held that a state must provide an indigent criminal defendant with the assistance of a psychiatrist when the defendant places at issue his sanity at the time of the offense. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Appellants analogize the patient subject to involuntary commitment to the criminal defendant because each has a liberty interest in the outcome of the relevant proceedings. Because of this parallel interest, appellants insist that the patient subject to involuntary commitment, like the criminal defendant who pleads insanity, has a right to the assistance of a consulting psychiatrist. However, while *Ake* is relevant, it does not control our decision in light of other Supreme Court precedent clearly indicating that constitutional protections granted criminal defendants are not automatically extended to civil commitment proceedings. *Cf. Addington*, 441 U.S. at 428 ("a civil commitment proceeding can in no sense be equated to a criminal prosecution").[3]

Because significant liberty interests are at stake, involuntary civil commitment proceedings must satisfy due process, *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980);

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3 Even the criminal defendant who wishes to plead insanity does not have an automatic right to the assistance of a psychiatrist. Instead, the criminal defendant must make a threshold showing that his sanity will be a "significant factor" at his trial before the right to a psychiatrist attaches. *Ake*, 470 U.S. at 82-83. This issue does not arise in commitment or retention proceedings because the state has by definition put the subject's mental illness in issue.

Addington, 441 U.S. at 425, as guided by three factors: (i) the interests of the individual subject to involuntary commitment; (ii) the governmental interest affected by the provision of additional safeguards; and (iii) the risk of erroneous deprivation of the individual's interests without additional safeguards, and the probable value, if any, of such additional safeguards. *Ake*, 470 U.S. at 77; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Erroneous commitments, of course, implicate the individual's interest in liberty. *See, e.g., Addington*, 441 U.S. at 425. Appellants emphasize this interest and identify additional ways in which an erroneous commitment may cause harm, including the stigma of being labelled mentally ill by the state, the potential financial loss to the patient, who, if able, must pay part of the cost of treatment while committed, and the possibility of psychological harm to the patient resulting from the commitment. However, erroneous non-commitments or releases also implicate other interests of the individual that must be considered in due process analysis. There is thus an interest in receiving treatment for one's mental illness. There is also an interest in avoiding situations in which the individual harms him or herself. Finally, the individual benefits from not harming, or threatening to harm, third parties, actions that might lead to criminal incarceration or injury to the individual through responsive acts of self-defense by the third parties.

The governmental interest is primarily financial. According to the state defendants, providing every indigent involuntary patient with a consulting psychiatrist would entail large expenditures. Appellants dispute this claim and suggest that providing indigent patients with a consulting psychiatrist may in fact save state money by reducing the number of persons involuntarily committed.

Although the state's assessment of fiscal consequences is far more certain than that of appellants, a closer scrutiny of those consequences is unnecessary because of the third element of due process analysis.

This element compels us to evaluate the probable value of a consulting psychiatrist and the risk of error if such assistance is not provided. Relevant to this inquiry are the safeguards and procedures that currently exist to protect against erroneous commitment. Also relevant are the unique nature of civil commitment proceedings and the dual goals of involuntary commitment—to provide care and treatment to those unable to care for themselves and to protect the individual and society from those who pose a danger to themselves and others because of mental illness. *See Addington*, 441 U.S. at 426.

We conclude that the due process clause does not require a state to provide an indigent patient with a consulting psychiatrist in every commitment or retention proceeding. Such a psychiatrist would perform two functions: (i) providing testimony favorable to non-commitment or release if the psychiatrist's professional judgment so warrants; and (ii) providing assistance to counsel in preparing the patient's case even where the doctor favors commitment or retention. These functions are not of sufficient import to implicate due process in every proceeding.

We examine first the need for testimony by a consulting psychiatrist. Presently, a psychiatrist testifies at commitment or retention hearings on behalf of New York State and opines as to why the patient needs involuntary treatment. If the hearing judge believes additional expert testimony is warranted, an independent psychiatrist may examine the patient and testify at the hearing. N.Y. Jud.

Law § 35(4) (McKinney Supp. 1992). The patient's attorney has an opportunity to cross-examine these experts, as well as any other adverse witnesses. If a consulting psychiatrist were to testify, his or her testimony would, by definition, favor release and thus would to some degree contradict the conclusions of the state's witnesses.

Psychiatrists often disagree about the proper diagnosis and treatment of particular patients, *see Addington*, 441 U.S. at 429-30, and we can assume that psychiatrists may also be unable to predict future dangerousness with great certainty, *see Barefoot v. Estelle*, 463 U.S. 880, 900 n.7 (1983). We may also assume that some psychiatrists tend to favor institutionalization more often than others who tend to favor release. However, we have no basis for assuming that psychiatrists associated with the state have a bias toward institutionalization.

Given these assumptions, we may conclude that the provision of a consulting psychiatrist in every commitment or retention proceeding will increase the number of instances in which conflicting psychiatric testimony is given. We may also conclude that the increase in conflicting psychiatric testimony may to some indeterminant degree decrease the number of commitments and retentions. However, a decrease in the number of commitments or retentions is not the same as a decrease in the number of erroneous adjudications, which is the focus of due process analysis. The consulting psychiatrist will not always be right and the state psychiatrist always wrong, or vice-versa.

In the ordinary adversary system, we tolerate and sometimes require a "battle of the experts" because it is thought to increase the accuracy of a trial's outcome. *See, e.g., Ake*, 470 U.S. at 81 (In a criminal prosecution where

defendant's insanity is at issue, competing testimony of psychiatrists enables jury "to make its most accurate determination of the truth on the issue before them."). The logic underlying the "battle of the experts" in criminal proceedings does not hold in the context of civil commitment proceedings, however. Unlike civil or criminal proceedings, the interests of the parties to a civil commitment proceeding are not entirely adverse. The state's concerns are to provide care to those whose mental disorders render them unable to care for themselves and to protect both the community and the individuals themselves from dangerous manifestations of their mental illness. *Addington*, 441 U.S. at 426. A major component of the state policy is thus the protection of mentally ill individuals, as recognized by New York's provision of multiple and repetitive opportunities for involuntary patients to obtain release. And finally, "[i]t cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." *Addington*, 441 U.S. at 429.

The goals of due process in these circumstances are thus to provide procedures that protect against erroneous non-commitments and releases as well as against erroneous confinements. Although the testimony of a consulting psychiatrist may be assumed to move adjudicators toward the latter goal, it must also be assumed to move adjudicators away from the former goal. However, the goals may not be of equal weight. Erroneous confinements may cause greater harm than erroneous non-commitments or releases, and, while the testimony of consulting psychiatrists may not alter the number of erroneous adjudications, we can speculate that it will reduce the most harmful errors.

However, the consulting psychiatrist's function of providing favorable testimony overlaps with the function performed by independent psychiatrists, at least when the independent psychiatrist favors non-commitment or release. Indeed, a court-appointed psychiatrist, whether designated as independent or consulting, is likely to be the same person. The only difference, therefore, is that a consulting psychiatrist would not testify if he or she favored commitment, whereas an independent psychiatrist would. But appellants do not claim that they are entitled either to a consulting psychiatrist who favors non-commitment or release or to exclude adverse psychiatric testimony. Appointment of a consulting psychiatrist will not, therefore, provide favorable testimony beyond that available from a court-appointed independent psychiatrist. Appellants' right to a testifying psychiatrist, therefore, is fulfilled so long as constitutionally adequate procedures exist for the appointment of an independent psychiatrist.

We turn now to appellants' claim that the Due Process Clause requires the appointment of a consulting psychiatrist even when such a doctor cannot as a professional matter give testimony favorable to the patient's release. The responsibilities of the consulting psychiatrist would include, for example, suggesting strategies for cross-examining the state psychiatrist even though the consulting psychiatrist also believes that commitment is essential.

We do not believe the Due Process Clause always imposes such a requirement. The function of assistance to counsel is not one that we believe to be so significant that it is required in all cases. In some cases, evidence of dangerousness and mental illness other than the testimony of the state psychiatrist may be decisive. In other cases, we are confident that counsel will be able to gain a sufficient

level of expertise as to psychiatric matters to meet due process requirements. The need for litigators to become learned in other fields is not uncommon today, and we see no basis for compelling the state to provide a consulting psychiatrist in every commitment or retention proceeding. However, we acknowledge that there may be a limited number of cases in which counsel can show by affidavit a compelling fact-specific need for a consulting psychiatrist to educate counsel in particular aspects of a case. We limit the role to education in the complexities of psychiatric diagnosis because we believe that providing assistance in trial strategy might pose a dilemma for a psychiatrist whose professional judgment favored commitment. Such assistance might well entail the pressing of arguments believed by the psychiatrist to be irrelevant, specious, or misleading. In any event, no such affidavit has been filed with regard to any plaintiff in the instant matter, and we therefore leave further consideration of such a limited right to future cases.

C. *The Right to an Independent Psychiatrist*

The allegations of appellants' complaint suggest a second, related claim. Some proceedings may present a need for independent psychiatric testimony in addition to that offered by the state to ensure an accurate decision. As a practical matter such proceedings are limited to cases in which the presiding judge determines that the record leaves unexplored or unanswered questions and that additional psychiatric testimony is necessary. In such cases, the individual's interests in both freedom and self-protection are directly affected, and the failure to provide such testimony may implicate due process concerns. Appellants' second claim, therefore, concerns the adequacy of

New York's procedures for the appointment of an independent psychiatrist.

Section 35(4) of the New York Judiciary Law permits a judge conducting a commitment hearing to appoint an independent psychiatrist to examine the patient and testify as to the patient's condition. N.Y. Jud. Law § 35(4) (1992). In their complaint, appellants allege numerous deficiencies in the way Section 35(4) has been applied in Dutchess County. These include allegations that: (i) independent psychiatrists are infrequently used; (ii) only one psychiatrist is available to act as a court-appointed expert in Dutchess County, causing long delays in commitment hearings; and (iii) limitations on the compensation to be paid to court-appointed psychiatrists for their testimony reduces the number of psychiatrists willing to accept such appointments. Based on these allegations, appellants ask for, *inter alia*, a declaration that Section 35(4)'s application in Dutchess County "fails to satisfy the requirements of independent psychiatrist [sic] assistance that the Fourteenth Amendment to the United States Constitution imposes."

This claim was never addressed by Judge Goettel because of the procedural posture of the case when he granted summary judgment against appellants. At that time, the only motion for summary judgment had been made by appellants themselves, and their papers addressed only their broadest claim, namely a right in every commitment or retention proceeding to a consulting psychiatrist. While it might have been harmless to use appellants' motion as the vehicle for dismissing what is a facial claim on a record that needed no amplification as to that claim, appellants' motion did not provide a record suited to dismissal of their second, fact-based claim.

We cannot exclude the possibility that this narrower claim may have merit. Where the trier believes that an accurate assessment of the subject's psychiatric condition cannot be reliably made without the aid of an independent psychiatrist, and the subject is financially unable to procure such testimony, a cognizable due process concern may arise. The liberty and self-protection interests of the subject are at stake, the fiscal consequences to the state are far more attenuated than in the case of a claim to a consulting or independent psychiatrist in every commitment or retention proceeding, and the danger of an inaccurate ruling is established by the trier's judgment that independent psychiatric testimony is necessary. Of course, because of the non-adversary nature of such a proceeding, the independent psychiatric testimony may favor commitment or retention, the reason, perhaps, that appellants' counsel has not emphasized the narrower claim.

Whether New York's procedures sometimes do not provide access to the testimony of an independent psychiatrist when the presiding judge believes such testimony to be necessary cannot be determined on the record before us. We therefore remand for further proceedings on this claim.

CONCLUSION

In sum, the Due Process Clause does not grant an indigent individual subject to involuntary commitment an absolute right to the assistance of a consulting psychiatrist. Such a right might arise in a case in which counsel has shown a compelling fact-specific need for the assistance of a psychiatrist to educate counsel in particular aspects of a case. No such showing has been made with regard to any plaintiff in the instant matter. Nor is there an

absolute right to the assistance of an independent psychiatrist. However, where the presiding judge determines that such testimony is necessary to a reliable assessment of a patient, an indigent individual should have the right to obtain the testimony of an independent psychiatrist. The facts are not sufficiently developed for us to determine whether New York affords such a right, and we thus remand to the district court to determine whether New York's procedure for appointing a psychiatrist, as applied in Dutchess County, satisfies constitutional standards.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

Section 35(4) of New York's Judiciary Law provides that when a court orders a hearing to determine whether a person should be committed to or retained in a State mental institution, it "may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person." This codifies the historically-recognized, inherent power of a court to appoint disinterested expert witnesses to aid it in determining scientific issues. *See Scott v. Spanjer Bros., Inc.*, 298 F.2d 928, 930 (2d Cir. 1962). Crucial to the effective use of this practice is the requirement that the experts so appointed be independent and disinterested. *See People ex rel. Sweeting v. Johnston*, 26 A.D.2d 685 (1966) (mem.); *People ex rel. Butler v. McNeill*, 30 Misc. 2d 722, 728 (Sup. Ct. 1961). "A court-appointed medical expert who expresses his professional opinion in a trial is not a partisan, but is, in effect, the court's witness." *Massey v. The District Court*, 180 Colo. 359, 365 (1973). In the absence proof to the contrary, we may assume that

no State judge will appoint experts who are not disinterested and independent. We are encouraged in this assumption by our recognition of the duty that the State imposes upon the Mental Hygiene Legal Service to assist the court in obtaining section 35 expert opinion and to see that all requirements of law as to patients' admissions, treatment and discharge which affect patients' rights have been complied with. *See* N.Y. Mental Hyg. Law §§ 47.01, 47.03; McKinney's 1992 New York Rules of Court §§ 694.2, 694.4; *Ughetto v. Acrish*, 130 A.D.2d 12, 21-22, *appeal dismissed mem.*, 70 N.Y.2d 871 (1987). Indeed, in view of the hospital's legal duty and medical purpose to subject mentally disturbed persons to the least restrictive and shortest institutionalized treatment possible, *see* 14 NYCRR Part 36, Section 36.1, it ordinarily may be assumed that hospital officials themselves are not biased in favor of a different methodology. *See United States v. LaFromboise*, 836 F.2d 1149, 1152 (8th Cir. 1988); *Williams v. Wallis*, 734 F.2d 1434, 1438 (11th Cir. 1984); *cf. Youngberg v. Romeo*, 457 U.S. 307, 323 (1982); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984).

Appellants insist, however, that the proceeding by which the need for hospital care is determined must be treated as an adversary one. They demand the right to obtain at State expense the services of an expert whose report will not be available for review by State officials and whose testimony, if given, will be contradictory to that of the medical experts employed by the State or appointed by the court. This, I suggest, misconceives the role of a patient's attorney, which should be to see that the client gets such care and treatment as the clients needs, not to treat the State as an adversary to be fought tooth and nail whenever the client's liberty is threatened. I have

no doubt that, if sufficient funds are made available to a patient's lawyer, the lawyer will be able to find an "expert" to testify that the patient does not require hospitalization. "Experience has shown that an 'expert' can be found to support almost any position if one searches long enough and pays well enough." *LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197, 208 (4th Cir. 1984). That kind of expert testimony might fit quite comfortably into a murder trial. It seems out of place in a civil competency hearing where the "modern concept of handling cases of mental illness is treatment, not simply incarceration," and the objective of both the state and the patient is to return the patient to society as soon as "it is likely to be safe for others and helpful to the patient." *St. George v. State*, 283 A.D. 245, 248, *aff'd*, 308 N.Y. 681 (1954).

For the foregoing reasons and others capably expressed in Judge Winter's opinion, I agree with Judge Winter that no patient has an absolute right to the State-financed assistance of either a testifying or consulting expert. I am troubled, however, by my colleague's decision to make the State judge's finding of a "need" for such assistance into a constitutional requirement that the State must provide it. The State has the burden of proving by clear and convincing evidence the necessity of institutionalization. *Matter of Harry M.*, 96 A.D.2d 201, 208 (1983). If the testimony of attending physicians and section 35 medical experts does not satisfy the State court that this burden has been met, there is no need for the State to underwrite the hiring of an interested witness to testify to that effect.

The State's plan provides for the appointment of up to two independent, disinterested psychiatrists and limits the amount that they can be paid. As I understand the plan proposed by my colleagues, it calls into question not only the appointment of a third expert, who is interested, but

also the amount of his remuneration, and perforce the remuneration of the section 35 experts, which presently has a $200-$300 cap. In addition, the district court, upon remand, will have to take into account the alleged shortage of independent psychiatrists in Duchess County, the likely duration of such shortage, and its effect on the $200-$300 statutory cap. A federal court is ill-equipped to determine what adjustments, if any, should be made, and is ill-advised to force such adjustments on the State of New York as being mandated by the United States Constitution.

I either would deny appellants all relief, without prejudice to relief being sought in the State courts, or would abstain from any decision in the matter pending a resolution in the State courts of the issues raised herein. *See Reetz v. Bozanich*, 397 U.S. 82, 85-86 (1970); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-77 (1959); *Logan v. Arafeh*, 346 F. Supp. 1265, 1271-72 (D. Conn. 1972) (three-judge court), *aff'd mem.*, 411 U.S. 911 (1973).

JON O. NEWMAN, *Circuit Judge*, concurring:

I concur in Judge Winter's opinion and add these few words only to point out the hazard of reading too much into the quotation from the Supreme Court's opinion in *Addington v. Texas*, 441 U.S. 418, 429 (1979), concerning the relative consequences of releasing a mentally ill person and committing a mentally normal person.

Initially, we should bear in mind precisely what the Supreme Court said and the context in which it was said. Chief Justice Burger's opinion began the pertinent discussion by pointing out that "it is not true that the release

of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty." *Id.* This was so, he continued, because "[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma." *Id.* (citations omitted). That set the stage for the sentence Judge Winter quotes:

> It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Id.

The quoted sentence must not be understood to mean that committing a mentally normal person is no worse a consequence than releasing a mentally ill person. That is not what the sentence says. At most, it denies that it is "much better" to release a mentally ill person than to commit a mentally normal person. But the sentence surely does not deny that it remains better to release a mentally ill person than to commit a mentally normal person. And that is how the balance of consequences must be struck. It is true that releasing a mentally ill person has adverse consequences for that person. The person forgoes, or at least postpones the receipt of, needed treatment. But it cannot be that such consequences are equal to the consequences of committing a mentally normal person.

The wrongful deprivation of liberty under any circumstances is among the most grievous harms that society can inflict. Wrongful confinement in a mental hospital is a horrendous consequence. In addition, no matter how much care is exercised in the diagnosis of mental illness, it is inevitable that large numbers of mentally ill persons will not be diagnosed and will remain at liberty. A civilized society must therefore acknowledge that, if mistakes

are to be made, it is better to add one more mentally ill person to the population at liberty than to place within the asylum one person who is mentally normal.

The quoted sentence from *Addington* was written to contrast the relative risks of error that will be tolerated in the mental illness context from those that will be tolerated in the context of criminal conviction. *See id.* at 428-29. We usually say that it is better that some number of guilty persons go free than that one innocent person be imprisoned, though we might not all agree on the number of wrongful acquittals we are willing to accept to guard against one wrongful conviction. One familiar version is that it is better that ten guilty persons go free than that one innocent person is convicted, *see* 4 William Blackstone, *Commentaries* ch. 27, p. 358, a formula sometimes recounted in our criminal jurisprudence, *see, e.g., Furman v. Georgia*, 408 U.S. 238, 367 n. 158 (1972) (Marshall, J., concurring) (quoting William O. Douglas, Foreword in Jerome Frank and Barbara Frank, *Not Guilty* 11-12 (1957)); *Bunnell v. Sullivan*, 947 F.2d 341, 352 (9th Cir. 1991) (in banc) (Kozinski, J., concurring); *United States v. Greer*, 538 F.2d 437, 441 (D.C. Cir. 1976)[1]. However one might set the ratio in the criminal context, it is surely arguable that some lesser ratio should apply in the mental illness context. If ten to one is appropriate in the crim-

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1 More generous ratios have been expressed. *See, e.g.*, Sir John Fortescue, *De Laudibus Legum Angliae*, ch. 27, p. 65 (originally written 1471, republished in Dr. Chrimes ed., Cambridge Univ. Press 1949) ("I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly); Thomas Starkie, *Evidence* 756 (1824), *quoted in* IX Wigmore on Evidence § 2497 at 409-10 (Chadbourn rev. 1981) ("The maxim of the law is that it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned."). Many respected jurists have simply remarked that "it is far worse to convict an innocent man than to let a guilty man go free." *See, e.g., In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

inal context, then perhaps one could plausibly say that it is better that five or perhaps three mentally ill persons be released than that one mentally sound person be confined. The lower ratio reflects both the harmful consequence to the person if a mentally ill person is erroneously released and the continuing review of confinement that occurs in the mental health context but not in the criminal context. Whatever ratio one prefers in the mental illness context, my point is that we cannot reasonably say that releasing one mentally ill person is equal to confining one mentally sound person. Some ratio greater than one to one must be used.

Whatever ratio one selects, procedural protections must be fashioned to give some reasonable assurance that the pattern of erroneous releases and erroneous confinements will approximate the ratio that one finds tolerable. And in setting the ratio and formulating the appropriate procedural protections to achieve it, we would do well to consider the matter from behind John Rawls's veil of ignorance: we should select a pattern we would find tolerable not knowing whether we would be one of those erroneously released or one of those erroneously confined. *See* John Rawls, *A Theory of Justice* ch. 24 (1971).

These considerations ought to bear heavily on the implementation of the flexible due process standard that Judge Winter's opinion sensibly leaves for case-by-case development. The decision whether to afford the committed person the assistance of a consultant psychiatrist must be made in light of the fact that it is indeed better (even if not "much" better) to release a mentally ill person than to confine a mentally normal person. Of course, the appointment of a consultant psychiatrist does not necessarily mean that there will be an ultimate decision to release, much less a decision to release a mentally ill per-

son. All it means is that the adversary process will function on a more informed basis, leaving to the state court judge the final ruling as to whether confinement should be continued or ended.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 9134 (GLG)

LYLE R. GOETZ, individually, and
on behalf of all others similarly situated,

Plaintiff,

MARK CANS and ANNA SELLETTI, individually, and
on behalf of all others similarly situated,

Intervenors,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Defendants.

APPEARANCES:

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OPINION

GOETTEL, D.J.:

This case began with the allegation by plaintiffs that, *inter alia*, the Fourteenth Amendment's due process clause required the State of New York to provide a psychiatrist to indigent individuals subject to involuntary commitment or retention proceedings to testify on their behalf. This court held that the due process clause does not confer an absolute right to such assistance. *Goetz v. Crosson*, 769 F. Supp. 132 (S.D.N.Y. 1991). The Second Circuit affirmed this holding, 967 F.2d 29 (2d Cir. 1992), but remanded for consideration of another, narrower issue: whether alleged deficiencies in the process of obtaining independent psychiatrists for involuntary commitment and retention hearings in Dutchess County, when the presiding judge believes that such testimony is necessary, create a constitutional violation. Having completed discovery, both sides now move for summary judgment.

We will presume familiarity with the decisions mentioned above, as well as with our decision granting motions for intervention and class certification, and dismissing plaintiffs' claim relating to the Fifth Amendment privilege against self-incrimination. *See Goetz v. Crosson*, 728 F.Supp. 995 (S.D.N.Y. 1990). Therefore, we will not revisit the entire history of this case.

FACTS

Under New York law, the state may involuntarily hospitalize a person alleged to be mentally ill and in need of care upon the certification of two examining physicians. N.Y. Mental Hyg. Law § 9.27(a). The constitution also requires clear and convincing proof that the mentally ill person poses a substantial threat of physical harm to him or herself or to others. *Goetz*, 967 F.2d at 31. This period of involuntary hospitalization may not exceed sixty days without court approval. N.Y. Mental Hyg. Law § 9.33(a). At any time during this period, the person involuntarily admitted may request a hearing on the need for continued involuntary care, which must be held within five days of the request. New York Mental Hyg. Law § 9.31.

The institution must, absent further proceedings, release the patient within sixty days of the involuntary commitment or thirty days after the denial of an application for release, whichever is later. New York Mental Hyg. Law § 9.33(a). If the institution's director determines that further involuntary hospitalization is required, he may apply to the state court for a retention order, which is effective for an additional six months. New York Mental Hyg. Law § 9.33(a),(b). The patient may request a hearing to challenge the requested detention order, which must be held within five days of the request. New York Mental Hyg. Law § 9.33(a),(c). When the six months have expired, the institution may obtain another retention order effective for up to an additional year. New York Mental Hyg. Law § 9.33(d). The institution may obtain further retention orders, each effective for up to two years. *Id.* All of these retention orders may be similarly challenged by the patient. *Id.*

The involuntarily admitted patient may request a rehearing and review of any retention order by a judge other than the one who signed the original order. The patient also has the right to a jury trial. N.Y. Mental Hyg. Law § 9.35. A patient has the right to counsel during all these proceedings for involuntary commitment or retention, including court-appointed

counsel if the patient is financially unable to obtain representation. N.Y. Judiciary Law § 35(1)(a). During these proceedings, the court may appoint up to two psychiatrists to examine the patient and testify at the hearing. N.Y. Judiciary Law § 35(4). Psychiatrists employed at a state institution are not eligible for such appointment. N.Y. Court Rules § 822.3. The Second Circuit has labeled psychiatrists so appointed "independent psychiatrists." *Goetz*, 967 F.2d at 31.

Independent psychiatrists "receive reimbursement for expenses reasonably incurred and reasonable compensation for such services." N.Y. Judiciary Law § 35(4). Such compensation may not exceed $200 for one psychiatrist or $300 for two psychiatrists, although in "extraordinary circumstances" the court can exceed these limits. *Id.*

Both parties agree that the appointment of an independent psychiatrist generally results in a delay of at least a month in the affected court proceeding (four to six weeks, in the words of the plaintiffs; four to five weeks, in the words of the defendants), while disagreeing on the causes and legal import of the delay.

THE DECISION OF THE SECOND CIRCUIT

In affirming this court's conclusion that indigent patients contesting their commitment or retention have no necessary or absolute right to a psychiatrist to act as their expert witness, the Second Circuit emphasized the role of independent psychiatrists: "Appellants' right to a testifying psychiatrist, therefore, is fulfilled so long as constitutionally adequate procedures exist for the appointment of an independent psychiatrist." 967 F.2d at 35.

The court went on to describe the problems with obtaining independent psychiatrists alleged by plaintiffs in their appeal:

> In their complaint, appellants allege numerous deficiencies in the way Section 35(4) has been applied in Dutchess County. These include allegations that: (i) independent psychiatrists are infrequently used; (ii) only one psychiatrist is available to act as a court-appointed

> expert in Dutchess County, causing long delays in commitment hearings; and (iii) limitations on the compensation to be paid to court-appointed psychiatrists for their testimony reduces the number of psychiatrists willing to accept such appointments.

Id. at 36.

The court explained why these allegations required further consideration by this court:

> Where the trier believes that an accurate assessment of the subject's psychiatric condition cannot be reliably made without the aid of an independent psychiatrist, and the subject is financially unable to procure such testimony, a cognizable due process concern may arise. The liberty and self-protection interests of the subject are at stake, the fiscal consequences to the state are far more attenuated than in the case of a claim to a consulting or independent psychiatrist in every commitment or retention proceeding, and the danger of an inaccurate ruling is established by the trier's judgment that independent psychiatric testimony is necessary. . . .
>
> Whether New York's procedures sometimes do not provide access to the testimony of an independent psychiatrist when the presiding judge believes such testimony to be necessary cannot be determined on the record before us. We therefore remand for further proceedings on this claim.

Id.

The majority opinion did not, however, give any indication of what this court should do were we to find a constitutional violation.

DISCUSSION

The governing law on this issue is the due process clause of the Fourteenth Amendment. It is firmly established that since involuntary civil commitment proceedings can lead to a sig-

nificant deprivation of liberty, they must satisfy due process. *See Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Addington v. Texas*, 441 U.S. 418, 425 (1979).Three factors guide the courts in evaluating the constitutionality of a challenged procedure: (i) the interests of the individuals affected by the procedure; (ii) the probable value of additional safeguards, and the risk of erroneous deprivation of the individuals' interests without such safeguards, and (iii) the governmental interest that will be affected by additional safeguards, including the fiscal and administrative burden. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Due process analysis also turns on fundamental fairness. *Project Release*, 722 F.2d at 975. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissev v. Brewer*, 408 U.S. 471, 481 (1972).

Plaintiff, Intervenors and Class Members (hereafter "plaintiffs") argue that involuntarily hospitalized patients do not seek the appointment of independent psychiatrists at court proceedings because of the long delays such appointment causes in the proceedings, resulting in an impermissible chilling of their exercise of their right to a timely judicial hearing.

Plaintiffs contend that the delay in obtaining the testimony of independent psychiatrists is caused by the shortage of psychiatrists willing to perform such services, which in turn is caused, they argue, by the statutory limits on the compensation psychiatrists can receive for such services. Plaintiffs request a declaratory judgment that New York's procedures for the appointment of independent psychiatrists pursuant to Judiciary Law § 35(4), as applied in Dutchess County, violate due process.

Defendants maintain that the delay in obtaining testimony from independent psychiatrists results largely from the time required by the independent psychiatrists to conduct a thorough evaluation, given their other obligations as private practitioners, and to a small extent from the scheduling practices of the state judges in Dutchess County. Defendants deny that the statutory fee limits have led to a shortage of psychiatrists

willing to testify, and they deny the existence of any such shortage.

Before proceeding to our due process analysis, we consider defendants' contention that *Logan v. Arafeh*, 346 F. Supp. 1265 (D.Conn. 1972), *aff'd mem sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973) is dispositive of this case. *Logan* held that a Connecticut statute allowing the state to hold a person involuntarily committed to a mental institution for forty-five days without a judicial hearing did not violate due process. *Id.* at 1269. The instant situation is distinguishable, however, since it concerns a small sub-group of those persons who challenge their involuntary commitment, for whom the trier has determined that an accurate psychiatric evaluation requires the testimony of an independent psychiatrist. The instant situation, presenting a potentially greater danger of an inaccurate ruling, presents different due process concerns from the usual involuntary commitments at issue in *Logan*.

The Second Circuit has already sketched the due process analysis for the situation where "New York's procedures . . . do not provide access to the testimony of an independent psychiatrist when the presiding judge believes such testimony to be necessary," concluding that "a cognizable due process concern may arise." *Goetz*, 967 F.2d at 36. However, nothing has been presented to us in any way concerning the disappointment of presiding judges in obtaining psychiatric testimony. In fact, defendants have submitted an affidavit, uncontroverted by plaintiffs, from the Chief Clerk of the Supreme and County Courts of Dutchess County, who asserts that "[t]o my knowledge, there is no case in which the court appointed a psychiatrist pursuant to Judiciary Law § 35(4) in which this office was unable to obtain the services of a psychiatrist to perform such an evaluation."

The parties have led us instead to the issue of the constitutionality of the month-plus delays in involuntary commitment and retention hearings resulting from the appointment of an independent psychiatrist. Nevertheless, we will endeavor to adapt the Second Circuit's due process analysis to the facts presented to us.

As to the first prong of due process analysis, the interests of the individual, there is no genuine issue of material fact. The delays are real. The question is, does the individual have an interest in avoiding possibly unnecessary delays of at least a month in obtaining a hearing on his or her involuntary commitment due to the appointment of an independent psychiatrist, when the presiding judge believes that the psychiatrist's testimony is required for an accurate hearing?

In an earlier decision upholding the constitutionality of New York's procedures for involuntary civil commitment, the Second Circuit rejected appellants' argument that due process required an automatic preliminary probable cause hearing within forty-eight hours of commitment, followed by full commitment hearings within five days of commitment. *Project Release v. Prevost*, 722 F.2d 960, 974-75 (2d Cir. 1983). The court emphasized that existing law provided for professional and judicial review of involuntary retention, "including notice to relatives and others designated by the patient, and the availability of a judicial hearing within five days of demand by the patient, relative or friend, as well as habeas corpus relief." *Id.* at 975.

The court's emphasis on the availability of judicial review within five days of a demand suggests that persons involuntarily committed have an interest in reasonably speedy judicial review of their commitment or retention. This is especially so given the inevitable "massive curtailment of liberty" following involuntary commitment to a mental institution, *Vitek*, 445 U.S. at 491, and given that in the instant situation there is a heightened danger of an inaccurate determination of the subject's mental state.

Of course, *some* delay in the hearing is inevitable when an independent psychiatrist is appointed, since the independent psychiatrist must have time to conduct a thorough evaluation, and since by definition an independent psychiatrist is one who has professional responsibilities other than waiting around for § 35(4) appointments. The crucial question is thus whether the delays in the instant case are reasonable in the context of due process concerns. This brings us to the second and third prongs of due process analysis.

The second prong of due process analysis considers the probable value of remedial measures, and the risk of erroneous deprivation of the individuals' interests without such safeguards, while the third prong concerns the burden on the government. We will consider these two prongs in tandem, since the burden on the government of remedying an unconstitutional situation depends largely upon whether effective remedial measures are readily available to it.

Defendants have mounted a comprehensive challenge to the notion that there is any way to get independent psychiatrists in Dutchess County to complete their evaluations of involuntarily hospitalized patients in less than three to four weeks. Defendants rely principally on excerpts from depositions of the three Dutchess County psychiatrists who have been available to accept § 35(4) appointments in the past year. Defendants argue, with support from affidavits and depositions, (i) that independent psychiatrists in Dutchess County have commitments to their private patients such that the average practitioner requires four weeks to be ready to testify in court; (ii) that ordering independent psychiatrists to complete their § 35(4) appointments faster would simply make it harder to find psychiatrists willing to accept such appointments; (iii) that contrary to plaintiffs' assertions, psychiatrists have regularly received remuneration in excess of the statutory minimum for their § 35(4) appointments; (iv) that notwithstanding plaintiffs' allegation that shortages of psychiatrists have led to delays, there has never been any problem in obtaining a psychiatrist to perform a § 35(4) evaluation; and (v) that there are simply not enough psychiatrists in Dutchess County to supply an enlarged § 35(4) panel, as envisioned in one of plaintiffs' affidavits. Indeed, the record shows that recently two of the psychiatrists on the § 35(4) panel have withdrawn, citing the heavy caseload from their private patients.

Plaintiffs do not dispute that psychiatrists in Dutchess County can receive, and have received, more than the statutory maximum. However, they point out that the language of § 35(4) that the statutory maximum can be exceeded only in

"extraordinary circumstances" has a depressing effect upon the willingness of psychiatrists who accept appointments. They also point out that in New York City there are apparently a number of psychiatrists available to accept appointments and that they turn out reports more rapidly than they do in Dutchess County. However, they are quite vague about what this court can or should do about these situations. Indeed, plaintiffs' position is that it is not up to them to determine how the situation can be altered. Rather, it is up to the court to declare it a constitutional violation and to compel the State or the County to find some way to improve the situation. (The only thing certain that such a ruling would accomplish is to allow plaintiffs' counsel to receive a fee as a prevailing party.)

However, in light of the second and third prongs of due process analysis, we are unlikely to declare a situation unconstitutional when, due to the lack of effective remedial measures, such a declaration would place a considerable burden on the government. We turn, then, to the question of what can be done about the allegedly unconstitutional delays in obtaining independent psychiatric testimony.

Plaintiffs have submitted an affidavit from a public defender pointing out that the county has psychiatrists "under contract" who are used to perform psychiatric examinations of criminals pursuant to New York's Criminal Procedure Law, Article 730. These psychiatrists complete their evaluations within twenty-four hours of notification, and submit their reports the day after the evaluation. Plaintiffs imply that there is no reason why the state cannot have such psychiatrists for purposes of conducting the independent psychiatric evaluations at issue in this case. Defendants' affidavits establish, however, that the so-called "contract" psychiatrists are, in fact, independent contractors, who are specifically stated not to be officers or employees of the county, and who conduct examinations for a fee of $150 with apparently no extra payment for "extraordinary circumstances." Moreover, defendants have established that the reason Article 730 examinations can be completed so much quicker and less

expensively that § 35(4) evaluations is that determination of competency to stand trial presents a much simpler medical issue than determining whether a patient should remain involuntarily committed to a mental institution. In short, there is little to suggest that Article 730 evaluations present a model for lessening the delays in obtaining § 35(4) testimony.

In another of plaintiffs' affidavits, a psychiatrist suggests that if "the court" were to set the fee for § 35(4) examinations at a sufficiently high level there would be more psychiatrists willing to perform the examinations and to do them more rapidly. We have no doubt that this is true. However, "the court" (whether it the state court or this court) has no authority to set compensation rates. Indeed, if the Supreme Court of Dutchess County were to set different rates, it would have no funds for which to pay them unless the state legislature were to appropriate them.

By virtue of the earlier Court of Appeals decision, this court is left in an almost untenable position. If we were to hold a trial at this time, we might well determine that independent psychiatric evaluations can be concluded and hearings held in a week or two less time in New York City than in Dutchess County. Assuming that we determined that this week or two difference is a due process violation, we still do not see this court as having any powers by which to convert bucolic Dutchess County into a metropolitan center like New York City with a large concentration of psychiatrists, some of whom would be willing to undertake this sort of work. Nor do we see how Dutchess County could speed up independent psychiatric evaluations without undue burden.

The opinion of Judge Van Grafeilland, who concurred on the primary issue but dissented as to the remand on the issue considered herein, perceives some of the problems that this remand might produce. He notes:

> As I understand the plan proposed by my colleagues, it calls into question not only the appointment of a third expert, who is interested, but also the amount of his remuneration, and perforce the remuneration of the section 35 experts, which presently has a $200-$300 cap. In

> addition, the district court, upon remand, will have to take into account the alleged shortage of independent psychiatrists in Dutchess County, the likely duration of such shortage, and its effect on the $200-$300 statutory cap. A federal court is ill-equipped to determine what adjustments, if any, should be made, and is ill-advised to force such adjustments on the State of New York as being mandated by the United States Constitution.

967 F.2d at 38. That is precisely the position that we are in. Neither the majority opinion nor the concurring opinion indicate what, if anything, we should do in the present circumstances.[1] We have no authority to alter the statutory rates for compensating independent psychiatrists, and we will not declare a situation unconstitutional when plaintiffs have failed to demonstrate that there are any readily available governmental remedies. Consequently, we deny the plaintiffs' motion for summary judgment and grant the defendants' motion for summary judgment.[2]

SO ORDERED.

Dated: White Plains, New York
November 23, 1993

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

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1 The concurring opinion of now Chief Judge Newman affords no additional assistance since it seems to be more of a dissent from the primary issue before the Court of Appeals as to whether there is a constitutional right to have a psychiatrist provided by the state to act as an expert witness opposing the position of state doctors.

2 We could, of course, deny both the motion and cross-motion for summary judgment and certify an interlocutory appeal. However, the Court of Appeals often refuses these invitations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 9134 (GLG)

LYLE R. GOETZ, individually and
on behalf of all others similarly situated,

Plaintiff,

MARK CANS and ANNA SELLETTI, individually and
on behalf of all others similarly situated,

Intervenors

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Defendants.

APPEARANCES:

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OPINION

GOETTEL, D.J.:

This case challenges the procedures employed by the State of New York for involuntarily committing psychiatric patients in Dutchess County. We will presume familiarity with our earlier decision granting motions for intervention and class certification, and dismissing plaintiffs' claim relating to the fifth amendment's privilege against self-incrimination. *See Goetz v. Crosson*, 728 F. Supp. 995 (S.D.N.Y. 1990). Thus, only a brief recitation of the facts is required.

I. *FACTS*

Under New York law, the state may involuntarily hospitalize an individual for up to sixty days upon the signature of two physicians. N.Y. Mental Hyg. Law § 9.27(a). Once such an individual is committed, he can demand a retention hearing to contest his confinement. N.Y. Mental Hyg. Law § 9.31(a). If the state satisfies the criteria for retention, the state can hold the patient for the longer of sixty days from the date of admission or thirty days from the order denying the application for release. N.Y. Mental Hyg. Law § 9.33(a).[1]

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[1] The state must show by clear and convincing evidence that the patient "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment." N.Y. Mental Hyg. Law § 9.01; *see also In re Jeannette S.*, 157 A.D.2d 783, 550 N.Y.S.2d 383, 384 (2d Dep't 1990) ("hospital must establish, by clear and convincing evidence, that the patient is mentally

Once this time has expired, further retention is not permitted unless the state applies for a further order of retention, at which time the patient is entitled to a hearing before a justice of the supreme court. *Id.* Moreover, even if the patient has not challenged his initial commitment, the state must seek such an order if it wishes to detain him beyond the sixty-day period. N.Y. Mental Hyg. Law § 9.33(b). The patient can thereafter seek rehearing and review of any order of retention before a different justice of the same court. N.Y. Mental Hyg. Law § 9.35. At any of these hearings, the court may order the appointment of no more than two psychiatrists or psychologists to examine the patient and testify at the hearing. N.Y. Jud. Law § 35(4). The psychiatrists are hired at state expense with a cap of $300 if two are appointed and $200 if only one is appointed. The statute does, however, permit an application for greater fees in exceptional circumstances.

We previously certified as class plaintiffs involuntarily committed psychiatric patients located in Dutchess County. The two hospitals affected are Harlem Valley Psychiatric Center ("HVPC") and Hudson River Psychiatric Center ("HRPC"). Plaintiffs' complaint first seeks a declaration that the due process clause of the fourteenth amendment mandates that the state appoint an advocate psychiatrist to assist the patient and his counsel at retention hearings, much like the mandatory assignment of defense counsel in criminal matters upon a showing of financial need. Plaintiffs seek a further declaration that New York Judiciary Law section 35(4) fails to satisfy such constitutional dictates.[2] Defendants, in turn, suggest that the statute comports with any constitutional requirements that may exist. Plaintiffs now move for summary judgment. Defendants, while admitting that there are no genuine issues of material fact to be tried, do not bother to make a cross-motion for summary judgment. Nonetheless, it

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ill and in need of further care and treatment, and that the patient poses a substantial threat of physical harm to herself or others").

[2] We previously dismissed plaintiffs' claim that the forced submission of involuntarily committed mental patients to a psychiatric examination violated the fifth amendment's privilege against self-incrimination. *Goetz*, 728 F. Supp. at 1003.

is well settled that if the requisite showing is made, we can grant summary judgment to the non-moving defendants. *See Project Release v. Prevost*, 722 F.2d 960, 969 (2d Cir. 1983).

At HVPC, once the patient contests his detention, a non-treating psychiatrist, Dr. Howard Smoller, who is nonetheless a HVPC employee, examines the patient. Smoller is not the psychiatrist involved in the daily treatment of the patients whom he examines. Smoller, unless he determines that the patient should be released, then testifies on behalf of the state at a retention hearing. The procedure at HRPC, however, is somewhat different. There, even if the patient contests confinement, the treating psychiatrist will testify at the retention hearing. However, defendants contend that while there is no employee with responsibilities analogous to those of Dr. Smoller, the treating physician's findings are nonetheless reviewed by at least one supervisory doctor. Plaintiffs challenge this purported supervisory involvement (through counsel's conclusory claims we might add), and while this creates a disputed issue of fact, it is not one which is material. Thus, it does not prevent the granting of summary judgment.

In Dutchess County, the overwhelming majority of retention hearings are held before either Justice Judith Hillary or Justice John King, Acting Justices of the Supreme Court of the State of New York, County of Dutchess. Generally, one presides at the initial hearing and, if necessary, the other will conduct the section 9.35 rehearing. As noted, they have the power to appoint up to two psychiatrists to examine the patient and testify at the hearing. Plaintiffs contend that while Justice Hillary usually appoints a psychiatrist if requested by the patient's counsel, Justice King does so only about half the time such a request is made, often demanding that counsel justify the making of such a request. The evidence establishes that in recent years, only Dr. Werner Cohn has accepted such appointments in Dutchess County. We are told, however, that quite recently a second psychiatrist, Dr. Paul Garson, has agreed to handle such matters. While hearings are held on a weekly basis, Cohn apparently is available only one day each

month and plaintiffs suggest that this creates unreasonable delays.

II. DISCUSSION

Plaintiffs initially claim that there is a due process right to a psychiatrist who will be an advocate for the patient. Even if the psychiatrist ultimately cannot recommend that the patient be released, plaintiffs argue that the psychiatrist remains necessary to assist the patient's attorney with the case.

In support of this contention, plaintiffs assert that commitment proceedings are quasi-criminal and, hence, the same protections afforded criminal defendants regarding the appointment of psychiatrists must apply. There is no doubt that the Supreme Court has recognized an indigent *criminal* defendant's right to the appointment of a psychiatrist to assist the defendant and his counsel when the defendant's mental state is at issue. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (court must appoint psychiatrist to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense"). The Court stated that when mental state is relevant to culpability and punishment, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80. Nonetheless, since we find that commitment proceedings are not criminal, we are not bound by the Court's ruling.

In previously dismissing plaintiffs' contention that their fifth amendment rights were violated, we concluded that retention proceedings under New York's Mental Hygiene Law were civil in nature. *See Goetz*, 728 F. Supp. at 1003. We relied, *inter alia*, on a decision of the Appellate Division, Second Department, which recognized that while criminal proceedings seek punishment and deterrence, the goal of retention proceedings is the "care and treatment" of the individual. *See Ughetto v. Acrish*, 130 A.D.2d 12, 518 N.Y.S.2d 398, 403 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 871, 518 N.E.2d 8, 523 N.Y.S.2d 497 (1987). In addition, it is clear that the expedited time periods established by New York's legislature attempt to insure that "committed persons may be

released after the briefest time in confinement." *Allen v. Illinois*, 478 U.S. 364, 370 (1986). Finally, while wrongful confinement must be avoided whenever possible, "the layer's of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." *Addington v. Texas*, 441 U.S. 418, 428-29 (1979). The same cannot be said of an erroneously convicted criminal defendant. Therefore, we reaffirm our earlier conclusion that the proceedings at issue are civil in nature.

Plaintiffs contend that even if this is not a criminal or quasi-criminal proceeding, due process demands that patients be given access to a psychiatrist they can call their own. Furthermore, they claim that the current law in New York fails to satisfy these constitutional demands. Among the alleged deficiencies with section 35(4) of New York's Judiciary Law are the following: (1) it is discretionary whether or not to appoint the expert; (2) the expert is a court expert and does not assist the patients' counsel on medical matters; (3) Dr. Cohn is only available once a month, which leads to delays of three to six weeks from the time an expert is requested until a hearing is held; and (4) $200 is grossly inadequate to attract a sufficient number of psychiatrists.

It is uncontroverted that involuntary commitment constitutes a deprivation of liberty and implicates the fourteenth amendment's due process clause. *Addington*, 441 U.S. at 425. The issue, therefore, is determining the process to which plaintiffs are entitled. In resolving this question, the Supreme Court has announced a three prong test:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Ake, 470 U.S. at 77.

Turning to the first prong, we admit that plaintiffs have a strong interest in not being retained if they do not require treatment. Besides the loss of one's liberty, there is an obvious stigma attached to confinement in a mental hospital. *Addington*, 441 U.S. at 425-26. Nonetheless, we reject plaintiffs' argument that this interest is the equivalent of a criminal defendant's, which the Supreme Court recognizes as "almost uniquely compelling." *Ake*, 470 U.S. at 78. It must be remembered that the commitment of a mental patient is for treatment, not punishment. Moreover, in retention proceedings the state is not seeking to "overcome the presumption of innocence," *id.*, but rather, to protect society *and often the patient himself* from danger. *See Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983) (state has interest "in providing care for those in need of treatment for mental illness and in maintaining order and preventing violence to self and others").

The second interest to be balanced is that of the state in opposing plaintiffs' proposal. In this regard, the state has important financial concerns that must be considered. It could become extremely expensive if the state were forced to hire a psychiatrist for a patient in every instance in which one is demanded. As it stands now, the presiding judge has the discretion to make such an appointment. Moreover, it is not as if merely hiring one psychiatrist will always suffice. Rather, if there is a patient psychiatrist and a state psychiatrist, the court may well utilize section 35(4) to hire a court psychiatrist to resolve the dispute. As to the hiring of these individuals, if, as plaintiffs suggest, the $200 fee is presently inadequate, it will remain inadequate. Thus, the state would be forced to raise its reimbursement rates, which would obviously injure an already fragile state economy. We recognize, of course, that when liberty interests are at stake, the mere fear of financial harm to the state is insufficient to avoid constitutional dictates. Thus, we must turn to the third prong of the test.

The third factor to be considered contains two sub-parts, the first being the value of the additional safeguards and the

second being the risk of an erroneous deprivation of rights if the proposal is not implemented. As to the first issue, there is no doubt that a judge relies heavily on the testimony of psychiatrists in such situations. He does so because he usually is dealing with an unbiased doctor who has no stake in the ultimate decision to release or retain the patient.[3] However, plaintiffs' proposal suggests that psychiatrists will be retained as advocates and this may limit the extent to which a judge may rely upon their testimony. There are also a number of other problems with plaintiffs' proposal, some of which have already been alluded to. Merely appointing a psychiatrist for the patient will not necessarily protect his rights. If, for example, the state's expert and the patient's expert proffer inconsistent opinions, the judge will likely seek a third expert, at state expense, to resolve the dispute. In addition, implementing plaintiffs' proposal may be rather difficult if, as plaintiffs suggest, the $200 fee is inadequate to attract psychiatrists. However, we are not persuaded by this argument since there is evidence establishing that even at this rate, counties within New York City have been able to attract more than one or two psychiatrists to act as court experts.[4] It may simply be that there are insufficient numbers of psychiatrists available in a small county like Dutchess to handle the alleged demand.

Besides the problems with attracting psychiatrists, there are substantive problems that exist concerning plaintiffs' proposal. First, the proposal may create ethical problems for appointed psychiatrists. If, for example, the doctor believes the patient should remain hospitalized, the question arises whether his allegiance belongs to his client, who would be better served by remaining hospitalized, or the attorney, who

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[3] Of course, judges do not rely exclusively upon the opinions of experts for if the patient actually takes the stand, judges can make their own observations.

[4] Defendants claim that these other counties, which have more psychiatrists available for section 35 appointments, experience similar delays to those occurring in Dutchess County. This may result, however, from a greater incidence of involuntary commitments in these other areas.

wants to "win" the case. It is important to recognize that a hospitalized mental patient is very often dangerous to *himself* as well as to the community. This situation is different from that where an attorney is appointed for a criminal defendant and must provide an adequate defense even if he believes his client is guilty. While both the attorney and the doctor have obligations to their respective clients, the criminal defense attorney's client obviously is better served if he is not incarcerated. Other concerns, however, are at issue with physicians since releasing a mentally ill patient may not necessarily be in the patient's best interests. As the Supreme Court has recognized, "[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free from stigma." *Addington*, 441 U.S. at 429.

Another concern raised by plaintiffs is that currently the court appointed expert often ends up testifying against the patient, thereby creating a disincentive for patients to request the appointment. We do not see what else could be required since the entire purpose of such proceedings is to determine the truth. If Dr. Cohn conducts an examination, he should be permitted to testify as to his findings. This concern would not be alleviated by the new proposal. First, the patient's psychiatrist could possibly be called as a witness for the state. Moreover, even if evidentiary rules prevented this, *see. e.g.*, N.Y. Civ. Prac. L. & R. 3101(d)(2), an issue upon which we express no opinion, it seems clear that an inference would be drawn if the doctor failed to testify. Plaintiffs seem to suggest that the doctor should conduct the examination, at state expense, but only testify if the patient likes what he is going to say. This seems to be an irrational approach in light of the purposes behind commitment proceedings. As to plaintiffs' need to call witnesses on their behalf, there is nothing preventing them from calling hospital employees, be they physicians or otherwise, to testify if they believe it would be helpful.

The next prong of the test is the risk of an erroneous deprivation of rights if the requested proposal is not implemented. In this regard, we must refer to the numerous protections

afforded plaintiffs under New York law. In consonance with the Supreme Court's decision in *Addington v. Texas*, 441 U.S. 418, 427 (1979), New York law requires a clear and convincing showing of both mental illness and a threat to oneself or others. *See supra* note 1. Moreover, the numerous levels of review available to patients more than adequately protect their rights. Before any involuntary commitment is permitted, two doctors must certify to such a need. Thereafter, there is the right to two hearings within a short period of time, before different judges, to contest retention.[5]

Additionally, state judiciary law specifically permits the appointment of court experts and Justices King and Hillary regularly make such appointments. The fact that Justice King does not always honor such requests does not interfere with plaintiffs' rights. There is nothing impermissible about a judge exercising his discretion in not appointing a court expert when he does not believe it would be profitable.[6]

Finally, when looking at whether plaintiffs' rights may be erroneously deprived if they are not given their own psychiatrist, we must look to the overriding purpose behind involuntary confinement. There is no concern with punishment or deterrence as exists in criminal cases and the state's goal is to permit functional, non-dangerous citizens to return to society as expeditiously as possible. Plaintiffs seem to ignore this fact. The care of the individual is of paramount concern.

For all the foregoing reasons, we find that the due process clause does not demand the appointment of a patient psychiatrist in retention hearings. Section 35(4) of the New York

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[5] In addition, HVPC employs a non-treating physician to examine the patient and testify at the hearing. Thus, an additional level of protection is afforded. While HRPC does not go this far, defendants contend that a supervisory physician verifies the treating physician's recommendation. As noted, plaintiffs do not necessarily recognize that such practices occur at HRPC. It is immaterial whether such review occurs or not, however, because of all the other safeguards built into the system. HVPC's practices are admirable, but superfluous.

[6] In fact, however, there is evidence that on at least a couple of occasions, Justice King appointed an expert when there had been no request made by the patient's counsel.

Judiciary Law affords plaintiffs all the protections to which they are entitled. Therefore, summary judgment for the defendants is granted and the clerk is directed to enter a judgment in their favor.

SO ORDERED.

Dated: White Plains, N.Y.
July 30, 1991

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 9134 (GLG)

LYLE R. GOETZ, individually and
on behalf of all others similarly situated,
Plaintiff,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, the Honorable JOHN R. KING, in his official capacity of Acting Supreme Court Justice, the Honorable JUDITH A. HILLERY, in her official capacity of Acting Supreme Court Justice, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,
Defendants.

APPEARANCES:

Counsel for Plaintiff, and Proposed Intervenors:

MENTAL DISABILITY LAW CLINIC
TOURO COLLEGE
Jacob D. Fuchsberg Law Center
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Huntington, New York 11743
By: William M. Brooks, Esq.
Of Counsel

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By: Robert L. Schonfeld, Esq.
Yolanda M. Pizzaro, Esq.
Of Counsel

OPINION

GOETTEL, D.J.:

This action challenges the procedures by which an individual may be involuntarily committed to a psychiatric hospital in Dutchess County. The plaintiff alleges that the current practices of the Dutchess County Supreme Court violate the Due Process Clause of the Fourteenth Amendment by denying the involuntary committee access to psychiatric or other expert assistance at civil commitment or retention proceedings. The plaintiff further alleges that the failure to permit the committee to assert the fifth amendment privilege against self-incrimination during examination by a non-treating psychiatrist further violates the Due Process Clause. The plaintiff seeks to have his action certified pursuant to Fed. R. Civ. P. 23 as a class action seeking a declaration that an individual facing retention has the right to the appointment of a state-funded psychiatrist or other appropriate expert who would be available to testify on the patient's behalf if his clinical condition warrants such testimony and otherwise assist in the preparation and presentation of the patient's case. He further seeks to certify a second class to obtain a declaration that the patient may not be compelled to submit to psychiatric examinations conducted by a non-treating psychiatrist who may then testify adversely at the patient's retention proceeding.

The defendants have cross-moved to dismiss the action claiming that it is not ripe for adjudication and that the plaintiff's fifth amendment claim fails to state a claim upon which relief may be granted.

I. *CIVIL COMMITMENT*

Pursuant to New York Mental Hygiene Law, the State of New York may involuntarily hospitalize an individual for up to sixty days upon the signature of two physicians. N.Y. Mental Hyg. Law § 9.27(a) (1988). During this initial sixty-day period, an involuntarily hospitalized patient may request a hearing, known as a retention hearing, to contest his confinement. N.Y. Mental Hyg. Law § 9.31(a) (1988). If, within the sixty-day period, the State proves that a patient satisfies the criteria for involuntary hospitalization, the State may confine such individual for up to sixty days from the date of the patient's admission to a psychiatric facility or thirty days from the date of an order denying the application for the patient's release, whichever is longer. N.Y. Mental Hyg. Law § 9.33(a) (1988).

Once this time period has expired, the director of the facility in which the patient is confined must apply for an order of retention if the facility wishes to further hospitalize the patient. A facility must also apply for an order of retention if it wishes to retain beyond a sixty-day period an involuntary patient who has not previously challenged judicially his initial commitment. N.Y. Mental Hyg. Law § 9.33(b) (1988). A patient for whom a facility has sought an order of retention may request a court hearing to challenge his confinement. N.Y. Mental Hyg. Law § 9.33(a) (1988). If the court determines that a patient satisfies the criteria for involuntary hospitalization and signs an order of retention pursuant to N.Y. Mental Hyg. Law § 9.33, the patient may request a rehearing and review pursuant to N.Y. Mental Hyg. Law § 9.35 (1988).

II. *FACTS*

A. *Lyle Goetz*

The plaintiff, Lyle Goetz, was involuntarily committed to the Harlem Valley Psychiatric Center ("HVPC") on or about March 21, 1987 and has remained there pursuant to an order of retention that expired on February 6, 1989. On February 2, 1989, at a retention hearing held in New York State Supreme

Court, Dutchess County, Acting Supreme Court Justice Hillery ordered the plaintiff confined to the HVPC for a period not to exceed twenty-four months.[1] Because this hearing was conducted without notice to the plaintiff's attorney, upon motion of plaintiff's counsel Justice Hillery vacated the order of retention on March 16, 1989 and recused herself from further proceedings on the matter. Mr. Goetz's retention hearing was then assigned to Acting Supreme Court Justice King and placed on the calendar for March 23, 1989. Justice King also recused himself.[2] Subsequently, Mr. Goetz's retention proceeding was assigned to Supreme Court Justice Ralph Beisner. In June 1989, the plaintiff moved before Justice Beisner for the appointment of a psychiatrist pursuant to the fourteenth amendment and specifically requested Dr. Lawrence Siegel. The state opposed the motion but did not object to the appointment of a psychiatrist under section 35 of the Judiciary Law.[3] Pursuant to section 35, Justice Beisner

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[1] Defendants Hillery and King are both County Court Judges of Dutchess County and both serve as Acting Supreme Court Justices. The plaintiff contends that Justice Hillery presides over approximately 50 percent of the retention proceedings conducted in Dutchess County and that Justice King presides over the remaining 50 percent.

[2] Justice King recused himself because, *inter alia*, he had been asked to serve as a witness in a civil suit in which Mr. Goetz's attorney was a party.

[3] Judiciary Law § 35 permits a court "to appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person." N.Y. Jud. Law § 35(3) (Supp. 1990). Section 35 provides for compensation by the state in an amount not to exceed $200.00. *Id.* This section has become the focus of the plaintiff's complaint. The plaintiff challenges not only the court's reluctance to appoint psychiatrists under this section, but also the effectiveness of the statute itself. In essence, the plaintiff argues that the $200.00 compensation limitation severely limits the availability of expert witnesses willing to serve on the section 35 panel. Moreover, the plaintiff argues that once appointed under section 35, the psychiatrist is permitted to testify on behalf of either the patient or the facility seeking to retain the patient. Thus, the plaintiff argues, the patient is denied the right to an independent psychiatrist who is available to testify only on the patient's behalf in violation of his constitutional rights. Due to the posture of the present motions, we do not reach the merits of the plaintiff's claims at this juncture.

appointed Dr. Siegel. Dr. Siegel declined appointment and the court subsequently appointed Dr. Werner Cohn. Dr. Cohn examined Mr. Goetz and testified at Mr. Goetz's retention hearing in August 1989. He was called, however, as a witness for the hospital and was cross-examined by Mr. Goetz's attorney. At the conclusion of the hearing, Justice Beisner ordered Mr. Goetz retained.

B. *Mark Cans*

In May 1989, the court received a motion by Mark Cans to intervene and serve as class representative. Mr. Cans has been confined involuntarily in the HVPC since approximately May 27, 1987. Mr. Cans' order of retention expired on June 17, 1989. As Mr. Cans did not wish to be further involuntarily retained, the HVPC commenced a retention hearing. Both defendants Hillary and King recused themselves and the matter was assigned to Justice Beisner. Mr. Cans moved for the appointment of a psychiatric expert pursuant to the fourteenth amendment. The state opposed Mr. Cans' motion but did not object to appointment pursuant to section 35. Justice Beisner appointed Dr. Lawrence Siegel pursuant to section 35 of the Judiciary Law. Dr. Siegel declined the appointment and Dr. Cohn was appointed. Dr. Cohn also declined the appointment and indicated an intention to do so in any case in which plaintiff's counsel herein represents the patient. The application for further retention of Mr. Cans remains *sub judice* in Supreme Court, Dutchess County.

C. *Anna Selletti*

In August 1989, Anna Selletti moved to intervene and serve as class representative. Ms. Selletti is an involuntarily retained psychiatric patient at the HVPC whose order of retention expired on September 10, 1989. Ms. Selletti's retention hearing is currently pending before Justice Beisner. Presumably because of the setbacks experienced by the other parties to this action, she has not requested appointment of an independent psychiatrist.

III. *INTERVENTION*

Initially, we consider the motions to intervene made by Mark Cans and Anna Selletti. Under Fed. R. Civ. P. 24(b), anyone may be permitted to intervene, upon timely application, "when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Clearly proposed intervenors Cans and Selletti share common questions of law with the plaintiff. Indeed, the claims raised by the proposed intervenors are identical to those raised by the plaintiff. No prejudice will result from the intervention. Consequently, the motions of Mark Cans and Anna Selletti to intervene as plaintiffs in this action is granted.[4]

IV. *JUSTICIABILITY*

The defendants move to dismiss the action on the grounds that none of the plaintiffs present a justiciable case or controversy. Indeed, this case presents a text book model of the interplay of the various Article III doctrines. At the commencement of this action, Lyle Goetz's retention hearing had not yet been scheduled and he had not yet requested psychiatric assistance. Thus, the defendants moved to dismiss for lack of ripeness. When Mr. Goetz came before Justice Beisner and was appointed a psychiatrist pursuant to Judiciary Law section 35, the defendants contended that the action was moot. The defendants have made similar arguments with respect to intervenors Cans and Selletti.[5] We must consider,

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[4] The question of whether either Mr. Cans or Ms. Selletti present a justiciable controversy will be considered *infra*.

[5] In the last series of submissions on these motions, the plaintiffs' attorney indicated that, in light of both the unavailability of any psychiatrist willing to take a section 35 appointment, and the court's prior treatment of such applications, he did not move for psychiatric assistance on behalf of Anna Selletti. He also suggested that, after Dr. Cohn's declination of the appointment, Mark Cans would no longer be vigorously pursuing appointment of an independent psychiatrist. In response to these

therefore, whether any or all of the plaintiffs present a ripe and justiciable case or controversy.

A. *Ripeness*

Justiciability is an expansive concept which embodies, *inter alia*, the overlapping doctrines of ripeness, standing and mootness. *See Flast v. Cohen*, 392 U.S. 83, 94-97 (1968). The ripeness doctrine requires that an action brought in federal court be "matured to a point that warrants decision." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984). The defendants initially contended that a plaintiff in this action could not assert a ripe case or controversy until they had requested and been denied psychiatric assistance. We note, however, that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough [to prevent dismissal on ripeness grounds].' " *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). When the defendants sought to retain the plaintiff past the expiration of his term of commitment, and the plaintiff expressed an intention to seek the appointment of an independent psychiatrist, we think a ripe controversy was presented. At that point, the only act left to be taken was the grant or denial of the plaintiff's request. A denial of the request would likely lead to an immediate hearing and decision on future commitment. We think the plaintiff should not be required to wait until after the hearing, and risk possible re-commitment, to assert his constitutional challenge. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' " (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967))).

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pronouncements, counsel for the defendants argued that the action as to these parties is now moot. The mootness doctrine is examined *infra*.

Both plaintiffs Goetz and Cans have come before Justice Beisner at a retention hearing and requested appointment of an independent psychiatrist. Thus, both of these plaintiffs, at least at some point, presented ripe controversies.[6] Anna Selletti has not requested appointment, allegedly due to the defeats suffered by her co-plaintiffs. In light of the identical decisions rendered by Justice Beisner in *Matter of Goetz* and *Matter of Cans*, and the indication that there is currently no psychiatrist in Dutchess county who will accept section 35 appointments, at least where plaintiff's attorney is counsel, we hold that, even in the absence of a specific motion for appointment of a psychiatrist, Ms. Selletti nonetheless presents a ripe controversy. The law does not require the doing of a futile act. *Cf. Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (government need not pursue unavailable witness); *Munchak Corp. v. Cunningham*, 457 F.2d 721, 725 (4th Cir. 1972) ("Equity does not require the doing of a futile act as a condition to the granting of equitable relief."). All plaintiffs stand to suffer great hardship—loss of their personal liberty—were we not to act at this time. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Consequently, the plaintiffs' action is ripe for adjudication.

B. *Mootness*

As the ripeness problem asserted by the defendants has been overcome, the defendants now argue that the action is moot. "[M]ootness represents a time dimension of standing, requiring that the interests originally sufficient to confer standing persist throughout the suit." 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3533.1, at 220 (2d ed. 1984). The mootness doctrine also ensures that a ripe cause of action remain so throughout the course of the litigation. If, at any time, the parties cease to

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6 "[R]ipeness is peculiarly a question of timing." *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (per curiam) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102. 140 (1974)). Consequently, the occurrence of intervening events is appropriately considered in evaluating ripeness. *Id.* at 113-14.

present a live controversy, the action is moot and dismissal is appropriate. The defendants argue that because Justice Beisner has granted the plaintiffs the relief they seek—appointment of a section 35 psychiatrist—the action has been rendered moot.[7]

The plaintiffs argue that their action is not moot because they have not received, for all practical purposes, the relief they seek. The plaintiffs challenge the constitutionality of section 35, not only for its under-utilization, but also for its practical inadequacies. *See supra* note 3. Although plaintiff Goetz's application for appointment of a psychiatrist was granted, he nonetheless complains that he lacked sufficient opportunity to consult with and utilize the psychiatrist to his advantage. The remaining plaintiffs have not received any of the relief they seek as there is currently no psychiatrist willing to accept a section 35 appointment to these plaintiffs. The plaintiffs' allegation that the compensation allowed by section 35 is inadequate to provide the plaintiffs with effective psychiatric assistance may be established by the refusal of two psychiatrists to assist Mr. Cans, though other factors may be involved. Although we do not now rule on whether the United States Constitution requires more than the plaintiffs have received, we do not think that the plaintiffs' claims have been mooted by the appointment of a psychiatrist to examine Mr. Goetz and testify at his hearing.

Even were we to find that the named plaintiffs' claims had been rendered moot, we would nonetheless deny the defendants' motion. In instances where a named plaintiff's claim has become moot after a motion for class certification has been filed, the relation-back doctrine provides an exception to the mootness rule.

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances,

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[7] Although Ms. Selletti has not moved for appointment of a psychiatrist, the defendants claim that her action is nonetheless mooted by her intention not to request such appointment.

> whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975). *Accord Jones v. Califano*, 576 F.2d 12, 22 (2d Cir. 1978); *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Mathis v. Bess*, 692 F. Supp. 248, 258-59 (S.D.N.Y. 1988); *Jane B. v. New York City Dep't of Social Services*, 117 F.R.D. 64, 67-69 (S.D.N.Y. 1987). "The *Sosna* exception . . . extends to cases in which the motion for class certification was filed before the action became moot as to the named plaintiff."[8] *Jane B.*, 117 F.R.D. at 69; *accord Jones*, 576 F.2d at 22.

Of particular concern is the potential ability of the defendant to purposefully moot the named plaintiffs' claims after the class action complaint had been filed but before the class had been properly certified. *White*, 559 F.2d at 857; *Mathis*, 692 F. Supp. at 258. That concern is very real in this action. The state court's decision to appoint a psychiatrist pursuant to section 35 to both plaintiffs Goetz and Cans could be construed as an attempt to squelch a spark before it turns into a conflagration. A conclusion that the plaintiffs' claims were now moot "would mean that the [state court system] could avoid judicial scrutiny of [their] procedures by the simple expedient of granting [relief] to plaintiffs who seek, but have not yet obtained, class certification." *White*, 559 F.2d at 857.

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[8] Most of the above-cited cases link the relation-back doctrine to a finding of a justiciable controversy at the time the complaint and the class certification motion were filed. In this case, the original motion for class certification was filed on January 19, 1989, along with the class action complaint. Although plaintiff Goetz's claim may not have been ripe at the time of filing, it has ripened into a cognizable claim during the pendency of the class certification motion. The rationale for the relation-back doctrine is equally served by applying it under these circumstances. So long as a justiciable controversy existed some time prior to class certification, a subsequent mooting of the named plaintiff's claims will not preclude class certification.

Under these circumstances, application of the relation-back doctrine is appropriate.

Moreover, the transitory nature of the plaintiffs' claims bolsters our conclusion that their class action is not moot. As stated by the Supreme Court, "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). If, as we have concluded, the plaintiffs' claim does not ripen until he has requested psychiatric assistance, it would be virtually impossible to file a class action complaint before a determination has been rendered on that request. Once the plaintiffs' motion has been denied, he has lost the opportunity to seek prospective relief. If the motion is granted, his claim is moot. The life span of the plaintiffs' claim is simply too short to ensure judicial review before mootness mandates dismissal. Under these circumstances, the relation-back doctrine will intervene to ensure that the justiciable class action claim is heard. *See Jane B.*, 117 F.R.D. at 67-68.

Finally, the existence of many similarly situated persons who are likely to face the same "Catch-22" warrant application of the relation-back doctrine. As in *Gerstein v. Pugh*, 420 U.S. 103 (1975), "in this case the constant existence of a class of persons suffering the deprivation is certain. The attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing live interest in the case." *Id.* at 399; *accord Jane B.*, 117 F.R.D. at 68.[9]

In sum, we reject the defendants' claim that the plaintiffs' action is moot. Our holding rests primarily on the conclusion that the plaintiffs have not been granted all the relief they seek. Even if their claims were satisfied, however, we would nonetheless reject the mootness challenge as the plaintiffs seek to pursue this action as representatives of a class of similarly situated persons.

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[9] Although the plaintiffs' attorney is not a public defender, he is representing this class of plaintiffs *pro bono* through the Mental Disability Law Clinic at Touro College School of Law.

V. *SELF-INCRIMINATION*

Before evaluating the plaintiffs' motion for class certification, we first must consider the defendants' motion to dismiss, for failure to state a claim, the plaintiff's claim that due process requires that the fifth amendment privilege against self-incrimination be applied to civil commitment proceedings. The Fifth Amendment privilege, which applies to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The protection of the fifth amendment permits an individual to refuse to "answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *accord Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

The question of the application of the privilege against self-incrimination to civil commitment proceedings was recently addressed by the Supreme Court in *Allen v. Illinois*, 478 U.S. 364 (1986). *Allen* involved a proceeding to determine whether a defendant who had engaged in criminal conduct was in need of involuntary psychiatric care and treatment as a "sexually dangerous person" pursuant to Illinois state law. *Id.* at 365-66. The threshold question posed by the Court in determining whether the Fifth Amendment privilege applied to such proceedings was whether the commitment proceedings were criminal or civil in nature. *Id.* at 368. To resolve this issue, the Court first examined the language of the Illinois statute that declared the proceedings to be civil. *Id.* Recognizing, however, that punitive purposes may underlie a civil label, the Court analyzed the nature of the proceedings to determine if despite the stated treatment purpose of the scheme, the process was actually punitive in nature, thereby rendering it a criminal proceeding. *Id.* at 369. Concluding that the plaintiff failed to sustain its burden of proving that the commitment scheme had a criminal purpose, the Court concluded that the privilege against self-incrimination did not apply to the Illi-

nois retention proceedings. *Id.* at 375. In so doing, the Court specifically rejected as "not good law," *id.* at 372, broad language in *In re Gault*, 387 U.S. 1 (1967) that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty." *Id.* at 50.

The petitioner in *Allen* further argued, as does the plaintiff herein, that even if the commitment proceedings at issue were not criminal, the due process guarantees of the fourteenth amendment independently require application of the privilege. In rejecting this contention, the Court declined to hold that "the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case." *Allen*, 478 U.S. at 374. The Due Process Clause requires certain procedural safeguards before a person may be deprived of life, liberty or property to guard against the risk of erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976). Application of the privilege of self-incrimination to civil commitment proceedings, however, will not advance the reliability of the commitment process. *Allen*, 478 U.S. at 374. The fifth amendment privilege, therefore, "has no place among the procedural safeguards discussed in *Mathews v. Eldridge*, which are designed to enhance the reliability of [the factfinding] process." *Allen*, 478 U.S. at 375. Accordingly, the *Allen* Court determined that the Illinois commitment proceedings "were not 'criminal' within the meaning of the Fifth Amendment to the United States Constitution, and that due process does not independently require application of the privilege." *Id.*

The Supreme Court's analysis applies equally to the civil retention proceedings at issue in this case. This issue was squarely addressed by the New York Supreme Court, Appellate Division, Second Department and we find their discussion persuasive.[10]

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[10] Indeed, the *Ughetto* action was commenced by the plaintiff's attorney herein and defended in part by defense counsel in this case. Moreover, *Ughetto* challenged the procedures of the Harlem Valley Psy-

> It is clear that facially the involuntary commitment proceedings under the Mental Hygiene Law are civil and not criminal in nature. Furthermore, upon an examination of the statutory scheme, it is equally apparent that the overall purpose of the proceedings, including the prehearing interview, is to ensure that patients receive the care and treatment that is necessary based upon their condition and is not for the purpose of exacting punishment. . . . Further, as is made clear in *Allen* in its rejection of *Gault*, the mere fact that statements adduced during the interview will be used at a hearing, which may result in confinement and a deprivation of liberty, will not suffice to convert the nature of the proceeding from civil to criminal.

Ughetto v. Acrish, 518 N.Y.S.2d 398, 403 (2d Dep't), *appeal dismissed*, 70 N.Y.2d 871 (1987). We hold, therefore, that the fifth amendment privilege against self-incrimination does not apply to the civil commitment proceedings that are the subject of this litigation. Neither the fifth nor the fourteenth amendments of the United States Constitution require such application and valuable precedent leads us to conclude that its application would be inappropriate in the civil retention proceedings at issue herein. Accordingly, the defendants' motion to dismiss the plaintiff's third cause of action for failure to state a claim is granted.

VI. *CLASS CERTIFICATION*[11]

The plaintiffs seek to certify a class of all individuals civilly committed within Dutchess County who will request retention hearings to challenge their hospitalization. Initially, because we have concluded that a ripe controversy does not

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chiatric Center, the facility in which the plaintiff herein is involuntarily held.

[11] The plaintiffs seek certification of two subclasses. The first subclass would assert the constitutional challenge to the current retention procedure and section 35 of the Judiciary Law. The second subclass would raise the fifth amendment challenge discussed above. Having dismissed the third cause of action containing that claim, we need only consider the first of the plaintiffs' proposed classes.

arise until psychiatric assistance is requested, the class must be redefined as all individuals civilly committed within Dutchess County who will request retention hearings to challenge their hospitalization and will further request the assistance of an independent psychiatrist.

Having placed most of their eggs in the justiciability basket, the defendants do not raise serious questions as to the propriety of class certification. The sole point in opposition that we have gleaned from the defendants' papers is that the plaintiffs' claims are not typical of the class because their retention hearings have been held before Justice Beisner while the named defendants are Justices King and Hillery. The plaintiffs have established, by affidavit testimony, that defendants King and Hillery collectively presided over nearly 100 percent of the retention hearings held in Dutchess County before this litigation was commenced. The plaintiffs' hearings have been held before Justice Beisner largely because Justices King and Hillery had been named as defendants in this action. Thus, the fact that the majority of the putative class members may appear before different Justices than the plaintiffs is a condition that cannot be avoided and it does not defeat class certification.

There can be little question that the putative class satisfies the numerosity requirement of Fed. R. Civ. P. 23(a). Plaintiffs' counsel estimates that one hundred to two hundred individuals from the HVPC alone request retention hearings each year, and approximately one quarter of those patients request psychiatric assistance. *See Korn v. Franchard Corp.*, 456 F.2d 1206, 1209 (2d Cir. 1972) (class of 40 sufficiently numerous); *see also Deary v. Guardian Loan Co.*, 534 F. Supp. 1178, 1190 (S.D.N.Y. 1982) (numerosity need not be demonstrated with precision). Moreover, the membership of the class is constantly changing.

> The fluid composition of the . . . population is particularly well suited for status as a class because while the identity of the individuals involved may change, the nature of the harm and the basic parameters of the group affected remain constant.

Bruce v Christian, 113 F.R.D. 554, 557 (S.D.N.Y. 1986). Consequently, the first prong of class certification is satisfied.

The plaintiffs also have no problem meeting the commonality aspect of Rule 23(a)(2) which requires that there be common questions of law or fact shared by the putative class members. There is no question that the claims raised by the plaintiffs are common to all members of the putative class. Indeed, there are few, if any, factual issues to contend with. The question of whether the fourteenth amendment requires the appointment of a psychiatrist who is available to testify promptly on the patient's behalf if his clinical condition so warrants and otherwise assist in the preparation of the patient's case is purely a question of law and its resolution is of concern to all potential class members.

Despite the defendants' contention that the different presiding Justices render the plaintiffs' claims different from those of the class, we find that the plaintiffs' claims are typical of other class members. The typicality and commonality requirements "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Despite the peculiar circumstance of differing presiding Justices as to the named plaintiffs, their claims are typical of the class members' and there is no indication that the named plaintiffs will not fairly and adequately litigate the class claims. Finally, there has been no suggestion that counsel for the class is less than able to adequately represent the class interests.

Having satisfied the requirements of Rule 23(a), we find that the proposed class, as modified, can properly be certified under Rule 23(b)(2) because "the part[ies] opposing the class [have] acted . . . on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Although reliance on Rule

23(b)(2) generally requires additional reasons for obtaining certification, *Davis v. Smith*, 607 F.2d 535, 540 (2d Cir. 1978), that justification is present by the threat of mootness if a class is not certified. *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986). As discussed above, the membership of the proposed class is transitory as patients are released, recommitted or elect to remain voluntarily. *Cf. id.* at 611-12 (class of prisoners certified because release or transfer to other prison would moot claim of overcrowding). Moreover, the possibility that the defendants could intentionally moot the named plaintiffs' claims sufficiently justifies class certification. *See supra*. "The plaintiffs' interest in averting the possibility of the action becoming moot with the concomitant interest in judicial economy, makes class certification in this case more than an empty formality . . . ." *Id.* at 612. Were we not to certify this class, the claims asserted by the plaintiffs might be rendered moot prior to resolution. Consequently, the class is certified pursuant to Rule 23(b)(2).

VII. CONCLUSION

In sum, the defendants' motion to dismiss the third cause of action for failure to state a claim is granted. The defendants' motion is in all other respects denied. The motions to intervene and serve as class plaintiffs by Mark Cans and Anna Selletti are granted and the plaintiffs' motion to certify a class to pursue the first and second causes of action is granted.

SO ORDERED.

Dated: White Plains, N.Y.
January 12, 1990

/s/ GERARD L. GOETTEL
GERARD L. GOETTEL
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No. 93-9357
Filed February 2, 1995

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of February one thousand nine hundred and ninety-five.

Goetz

—v.—

Crosson

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellants LYLE R. GOETZ, MARK CANS, and ANNA SELLETTI.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell,
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civil 9134(GLG)
Filed November 30, 1993

Lyle R. Goetz, individually, and
on behalf of all others similarly situated,
Plaintiff,

Mark Cans and Anna Sellettti, individually,
and on behalf of all others similarly situated,
Intervenors,

—against—

The Honorable Matthew Crosson, in his official capacity of chief administrator of the courts of New York, and Dr. Richard C. Surles, in his official capacity of Commissioner of the New York State Department of Mental Health,
Defendants.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Gerard L. Goettel, U.S.D.J., and the Court thereafter on November 23, 1993, having handed down its opinion, denying the plaintiffs' motion for summary judgment and granting the defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiffs' motion for summary judgment is denied and the defendants' motion for summary judgment is granted.

Dated: White Plains, New York
November 30, 1993

/s/ JAMES M. PARKISON
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civil 9134(GLG)
Filed July 30, 1991

Lyle R. Goetz, individually, and
on behalf of all others similarly situated,
Plaintiff,

Mark Cans and Anna Selletti, individually,
and on behalf of all others similarly situated,
Intervenors,

—against—

The Honorable Matthew Crosson, in his official capacity of chief administrator of the courts of New York, and Dr. Richard C. Surles, in his official capacity of Commissioner of the New York State Department of Mental Health,
Defendants.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Gerard L. Goettel, U.S.D.J., and the Court thereafter on July 30, 1991, having handed down its opinion granting summary judgment in favor of the defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: White Plains, New York
July 30, 1991

/s/ JOSEPH F. CLORDT
Acting Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

New York Mental Hygiene Law Section 9.31 provides in relevant part:

> **(a)** If. at any time prior to the expiration of sixty days from the date of involuntary admission of a patient on an application supported by medical certification, he or any relative or friend or the mental hygiene legal service gives notice in writing to the director of request for hearing on the question of need for involuntary care and treatment, a hearing shall be held as herein provided.
>
> * * *
>
> **(c)** The court which receives such notice shall fix the date of such hearing at a time not later than five days from the date such notice is received by the court and cause the patient, any other person requesting he hearing, the director, the mental hygiene legal service, and such other persons as the court may determine to be advised of such date.

New York Judiciary Law Section 35 provides in relevant part:

> **1.a.** When a court orders a hearing . . . in a civil proceeding to commit or transfer a person to or retain him in

a state institution when such person is alleged to be mentally ill, mentally defective or a narcotic addict, . . . the court may assign counsel to represent such person if it is satisfied that he or she is financially unable to obtain counsel.

* * *

4. In any proceeding described in paragraph (a) of subdivision one of this section, when a person is alleged to be mentally ill, mentally defective or a narcotic addict, the court which ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall upon completion of his services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court. Such compensation shall not exceed two hundred dollars if one psychiatrist, psychologist or physician is appointed, or an aggregate sum of three hundred dollars if two psychiatrists, psychologists or physicians are appointed, except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

(2)

No. 94-2065

Supreme Court, U.S.
FILED
AUG 18 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI,
on behalf of themselves and all others similarly situated,
Petitioners,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-2065

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI,
on behalf of themselves and all others similarly situated,

Petitioners,

—against—

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Introduction

Respondents, the Chief Administrator of the courts of the State of New York and the Commissioner of the New York State Office of Mental Health, respectfully submit this brief in opposition to the petition for certiorari.

The petition should be denied because the issues presented do not merit review by this Court. Petitioners have pointed to no conflict with decisions of this Court or conflict among the courts of appeals, and have raised no important constitutional question which should be settled by this Court.

Statement of the Case

Petitioners, patients involuntarily committed to State psychiatric hospitals in Dutchess County, New York, commenced this action in 1988 in the United States District Court for the Southern District of New York. Petitioners claimed, *inter alia*, that due process requires the appointment of a "consulting" psychiatrist in all involutary commitment or retention proceedings to testify as an expert witness on a patient's behalf if his professional opinion favors the patient's release, and to assist the patient's attorney in preparing the case and formulating strategies for the cross-examination of the State's psychiatrist. In 1991, the district court (Goettel, J.) rejected this claim, and granted summary judgment to respondents. (Petition 49a-59a).

On appeal, the Second Circuit, in an order dated June 10, 1992, affirmed in part, reversed in part, and remanded. 967 F.2d 29 (2d Cir. 1992) (12a-36a). In its decision, the court held that due process does not require the appointment of a consulting psychiatrist in every civil commitment or retention proceeding. In reaching this conclusion, the Second Circuit rejected petitioners' argument that this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), holding that a criminal defendant who demonstrates that his sanity at the time of the offense is likely to be a significant factor at trial is entitled to psychiatric assistance, is applicable to this proceeding. As the circuit court pointed out, this Court elsewhere has specifically stated that civil commitment proceedings "can in no sense be equated" with criminal prosecutions. (Petition, 20a, quoting *Addington v. Texas*, 441 U.S. 418, 428 [1979]). In this respect,

the Second Circuit emphasized the unique nature of civil commitment proceedings, which serve dual goals—"to provide care and treatment to those unable to care for themselves and to protect the individual and society from those who pose a danger to themselves and others because of mental illness." (22a).

The court nevertheless recognized that significant liberty interests are at stake and that, therefore, involuntary civil commitment proceedings must satisfy due process. (20a). Applying the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Second Circuit held that the probable value of the consulting psychiatrist sought by petitioners, and the risk of error if such assistance is not provided, were insufficient to require, under the due process clause, that such a psychiatrist be appointed in every case. In assessing the value of a consulting psychiatrist's testimony, the court pointed out that, under New York law, if a judge determines that expert testimony in addition to that presented by the State is warranted, he may appoint an independent psychiatrist to examine the patient and testify at the hearing. (22a-23a).[1] Since the petitioners do not claim that they are entitled to a consulting psychiatrist who favors non-commitment or release, the appointment of such a psychiatrist would not provide favorable testimony beyond that available from a court-appointed independent psychiatrist. (25a). Thus, the Second Circuit found that the petitioners' right to a testifying psychiatrist not affiliated with the State "is fulfilled so long as constitutionally adequate procedures exist for the appointment of an independent psychiatrist." (25a).[2]

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[1] N.Y. Jud. Law § 35(4) provides that a court may appoint up to two psychiatrists. The statute provides for reimbursement of expenses and reasonable compensation, not to exceed two hundred dollars for one psychiatrist and three hundred dollars for two psychiatrists, "except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits."

[2] As to the petitioners' claim that the due process clause requires the appointment of a psychiatrist who would assist counsel in the prepa-

Although it rejected petitioners' claim of entitlement to a consulting psychiatrist, the Second Circuit nevertheless remanded the case to the district court for consideration of whether New York's procedures under the Judiciary Law, as applied, provided reasonable access to the testimony of an independent psychiatrist, where the presiding judge determines that such testimony is necessary to a reliable assessment. Because the record before the court did not permit resolution of this "fact-based claim," the court remanded for further proceedings. (26a-28a).

Upon remand, the parties conducted discovery. Thereafter, the district court again granted summary judgment to respondents, finding that New York's procedures for the appointment of independent psychiatrists, as applied in Dutchess County, satisfied due process, and that the delay occasioned by the appointment of an independent psychiatrist was unavoidable in view of the time necessary for an independent psychiatrist to conduct a thorough examination, the number of psychiatrists available, and their other professional responsibilities. (44a-45a).

On appeal, the Second Circuit, in an order entered November 28, 1994, affirmed. 41 F.3d 800 (2d Cir. 1994). (1a-11a). In its decision, the Second Circuit Court found that the third prong of the *Mathews* test, *i.e.*, the governmental interests, including fiscal and administrative burdens, implicated by additional procedural safeguards, was decisive. (7a).[3] The

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ration of the patient's case, the court found that such a function is not so significant that it is required in all cases. The court pointed out that there is no reason to believe that counsel will be unable to "gain a sufficient level of expertise as to psychiatric matters to meet due process requirements." (26a). The court went on to hold that where counsel can show in a particular case a need for a consulting psychiatrist, he could apply to the state court for such assistance. (26a).

[3] The court also held that although a more prompt examination and report by an independent psychiatrist could reduce the time that erroneously committed patients would spend in a facility, the damage to the patient's interests by such a delay is limited. According to the court, the

court concluded that any delay in obtaining the services of independent psychiatrists was "directly related to the number of psychiatrists in or near Dutchess County who are not associated with the state" and to their other obligations, including their private patients, that "preclude them from acting immediately upon a request to serve as an independent psychiatrist." (7a-8a). Rejecting petitioners' claim that the fees paid to the independent psychiatrists contributed to the delay, the court noted that the record reflects that payments in excess of the statutory $200 are made, and that "the record does not support the conclusion that greater fees would eliminate the delay." (8a).

Petitioners then petitioned for rehearing with a suggestion that the appeal be reheard in banc. The Second Circuit denied the petition on February 2, 1995. (77a).[4]

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delay of a few weeks in obtaining a hearing with the benefit of an assessment by an independent psychiatrist does not involve a "massive curtailment of liberty." (7a).

[4] On May 3, 1995, petitioners filed a motion to proceed *in forma pauperis* without an affidavit of indigence, together with a petition for a writ of certiorari. In that motion, petitioners' attorney, William M. Brooks, explained the absence of an affidavit of indigence by noting that he had not had contact with petitioners Mark Cans and Anna Selletti since 1989 and was thus unable to obtain affidavits from them. He further averred that he had last had contact with petitioner Goetz in 1991, at which time Mr. Goetz informed him that he "was so discouraged and frustrated by his unsuccessful attempts to leave the hospital that he wanted nothing more to do with the law or lawyers and was willing to remain institutionalized for the rest of his life or whenever the hospital chose to release him." On May 30, 1995, this Court denied the motion for leave to proceed *in forma pauperis* without affidavits of indigence. Petitioners subsequently filed the instant petition.

Reasons For Denying The Writ

A. Due Process Does Not Require Psychiatric Assistance In Civil Commitment Proceedings

Petitioners ask this Court to review whether due process requires the appointment of a psychiatrist to assist an indigent patient who is challenging his involuntary commitment to or retention in a psychiatric hospital. Petitioners base their claim on this Court's opinion in *Ake v. Oklahoma*, 470 U.S. at 68, arguing that the present case offers this Court the opportunity to "resolve the question of the applicability of *Ake* to civil commitment hearings." (Pet. at 12). However, that question needs no resolution by this Court.

The Second Circuit's decision is fully in accord with this Court's precedents holding that civil commitment proceedings are not criminal in nature and that the same procedural protections do not apply. *Ake* involved a criminal prosecution in which the defendant raised an insanity defense. This Court recognized that the private interest at stake in a criminal proceeding is "almost uniquely compelling". 470 U.S. at 78. By contrast, this Court has repeatedly recognized that civil commitment proceedings, while undoubtedly involving a significant deprivation of liberty, "can in no sense be equated to a criminal prosecution." *Addington v. Texas*, 441 U.S. at 428. Thus, in *Addington*, the Court held that the criminal standard of proof was not constitutionally mandated in civil commitment proceedings. In reaching this conclusion, the Court recognized that the public and private interests at stake in civil commitment proceedings are different than in criminal proceedings, concluding that "it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. . . . It cannot be said, therefore, that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed." *Id.* at 429. With respect to the risk of erroneous confinements, the Court also recognized that, unlike criminal prosecutions, "the

layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." *Id.* at 428-429.

Since *Addington*, this Court has repeatedly reaffirmed the distinction between civil commitment and criminal prosecution, holding that the interests involved and the purposes of the proceedings are different, and that therefore the procedural protections applicable in criminal proceedings do not pertain to civil commitments. *See Heller v. Doe By Doe*, 113 S. Ct. 2637, 2645 (1993); *Allen v. Illinois*, 478 U.S. 364 (1986).

Thus, contrary to petitioners' contention, this Court has already addressed the nature of civil commitment proceedings and the procedural protections required. The Second Circuit's decision in this case was no more than a straightforward application of the principles established by this Court, and does not merit the Court's review.[5]

B. Petitioners Were Provided Reasonable Access To Independent Psychiatrists

Petitioners also ask this Court to review whether New York's procedures, as applied in Dutchess County, afford adequate access to independent psychiatric testimony and, in particular, whether the appointment of an independent psychiatrist pursuant to N.Y. Jud. Law § 35(4) causes unreasonable delays in hearings. This issue does not merit review by this Court. The Second Circuit's decision on this issue, which is based on the particular situation in Dutchess County, New York, is limited to the facts there and will have little impact beyond the boundaries of Dutchess County.

Moreover, as the Second Circuit correctly held, adequate access to independent psychiatrists is afforded to involuntary

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[5] In *Procter v. Harris*, 413 F.2d 383 (D.C. Cir. 1969) (Burger, J.), the court, addressing the very argument pressed by petitioners here, reached the same conclusion as the Second Circuit.

psychiatric patients, given the limited availability of psychiatrists and the constraints imposed by their professional schedules. This Court has recognized that, in evaluating whether a delay is reasonable, courts must be cognizant of the "practical realities" of a particular situation, and "must allow a substantial degree of flexibility." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). The Second Circuit and the district court in this case did nothing more than recognize the practical realities facing respondents. By applying traditional due process principles and weighing the competing interests, the courts found no constitutional violation. This unremarkable decision does not merit this Court's review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
August 18, 1995

Respectfully submitted,

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...JTION FILED
AUG 18 1995

(3)

No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and
ANNA SELLETTI, on behalf of themselves
and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON,
in his official capacity of chief
administrator of the courts of New York,
and DR. RICHARD C. SURLES, in his
official capacity of Commissioner
of the New York State Office
of Mental Health,

Respondents.

MOTION TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND DISABILITY ADVOCATES, INC., IN SUPPORT OF PETITION FOR *CERTIORARI*

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No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and
ANNA SELLETTI, on behalf of themselves
and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON,
in his official capacity of chief
administrator of the courts of New York,
and DR. RICHARD C. SURLES, in his
official capacity of Commissioner
of the New York State Office
of Mental Health,

Respondents.

MOTION TO FILE AN *AMICUS CURAIE* BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

1. I am an attorney admitted to practice before this Court and in this proceeding represent the National Association of Protection and Advocacy Systems and Disability Advocates, Inc. Pursuant to Rule 37 of the Supreme Court, the undersigned moves to proceed for leave to file a brief in support of the petition for *certiorari* in the above matter.

2. Consent to file this brief has been obtained from both the petitioners and the respondents.

3. The petition for *certiorari* raises the issue of whether the State must provide an indigent individual facing civil commitment with a psychiatric expert who can testify on the patient's behalf if the patient's clinical conditions warrants such testimony and assist in the preparation and presentation of the patient's case. This brief will bring to the attention of this Court a number of issues that are important when determining whether or not this Court should grant *certiorari*.

4. For example, the *amicus* brief sets forth the statutory provisions for the provision of expert assistance in other jurisdictions and hence, details how one of the issues raised impacts upon not only the class petitioners represent but thousands of mentally ill individuals nationally. who are subject to the civil commitment process.

5. This brief also details the necessity of psychiatric assistance because of the fallibility of both psychiatric diagnoses and the prediction of dangerousness which frequently go unchallenged and which courts frequently accept without reservation.

WHEREFORE, I respectfully request that this Court grant leave to file this brief in support of the petition for *certiorari*.

Dated: Islandia, New York
August 18, 1995

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No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and
ANNA SELLETTI, on behalf of themselves
and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON,
in his official capacity of chief
administrator of the courts of New York,
and DR. RICHARD C. SURLES, in his
official capacity of Commissioner
of the New York State Office
of Mental Health,

Respondents.

BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND DISABILITY ADVOCATES, INC., IN SUPPORT OF PETITION FOR *CERTIORARI*

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No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 199

LYLE R. GOETZ, MARK CANS and
ANNA SELLETTI, on behalf of themselves
and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON,
in his official capacity of chief
administrator of the courts of New York,
and DR. RICHARD C. SURLES, in his
official capacity of Commissioner
of the New York State Office
of Mental Health,

Respondents.

BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND DISABILITY ADVOCATES, INC., IN SUPPORT OF PETITION FOR *CERTIORARI*

INTEREST OF *AMICI CURIAE*

The National Association of Protection and Advocacy Systems ("NAPAS"), founded in 1981, is a membership organization for the nationwide system of

protection and advocacy agencies ("P&As"). P&As are established under the Protection and Advocacy for Mentally Ill Individuals ("PAMII") Act, as amended, 42 U.S.C. § 10801 *et seq.*, and related federal statutes, to provide legal representation and advocacy on behalf of persons with disabilities. In fiscal year 1994 alone, P&As served well over 600,000 individuals. NAPAS provides P&As with training and technical assistance and represents their interests before all branches of the federal government.

Disability Advocates, Inc., is a disability rights organization that performs protection and advocacy services pursuant to the PAMII Act. Disability Advocates is the organization responsible for providing protection and advocacy services to mentally ill individuals in Dutchess County, New York State. Hence, Disability Advocates is responsible for protecting the legal rights of members of the plaintiff class in this lawsuit. Consent has been obtained by the *amici* to file this brief.

Amici believe that this case raises a critical issue regarding the civil commitment of mentally ill individuals. The erroneous civil commitment of a person labeled mentally ill can have dire consequences. First, involuntary hospitalization results in a severe curtailment of individual liberty and freedom. Second, wrongful confinement can result in other unintended consequences. Many psychiatric institutions provide substandard treatment and subject patients to abuse and neglect. Moreover, prolonged hospitalization can actually worsen the mental state of people who could just as effectively receive treatment for any disability on an out-patient basis.

Amici are concerned that the current procedures in New York, which parallel procedures in other states, do not adequately protect patients whom a state subjects to a civil commitment hearing. In every instance, the committing hospital not only proffers expert psychiatric testimony, but can also rely on its psychiatrist to aid in its opposition to the patient's case. Such procedures do not adequately protect against erroneous confinement and lead to the harmful consequences that befall involuntarily hospitalized patients.

This brief will address issues arising out of the Second Circuit opinion dated June 10, 1992. However, for the reasons given in the petition for *certiorari*, *amici* believe that both the holding of the Second Circuit opinion dated November 28, 1994, and the significance of the issues arising out of the court's opinion, also warrant the granting of *certiorari*.

REASONS FOR GRANTING THE WRIT

THE PETITIONERS RAISE ISSUES OF A FUNDAMENTAL IMPORTANCE THAT AFFECT INVOLUNTARILY HOSPITALIZED PATIENTS THROUGHOUT THE UNITED STATES.

The critical role played by a psychiatric expert in a commitment hearing is beyond dispute. As this Court has recognized, "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and

psychologists." *Addington v. Texas,* 441 U.S. 418, 429 (1979) (emphasis in original). An examination of the record by *amici* reveals that in every commitment hearing in Dutchess County, the psychiatric hospital builds its case around expert testimony. *See* JA-393-94; 476.[1] Moreover, judges in Dutchess County, like every place else place an extraordinary amount of weight on the testimony of psychiatric experts. Accordingly, it is no surprise that the record further details that judges in Dutchess County almost always defer to expert testimony when deciding commitment cases. *See* JA-363, 479-480, 495.[2]

Thus, the granting of *certiorari* would enable this Court to determine whether the Constitution requires the provision of a court-appointed expert as of right, and, if so, in what capacity the court-appointed expert should function. The Second Circuit found that a court-appointed expert serves only to provide information to the court by requiring the appointment of a psychiatrist whose sole function consists of testifying about the patient's mental condition. However, in viewing the expert's role in such a limited fashion, the Second Circuit failed to apply this Court's view of a psychiatric expert as defined in *Ake v. Oklahoma,* 470 U.S. 68 (1985), as well as that

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[1]Unless otherwise noted, JA-_ refers to the joint appendix for the June 1992 opinion of the Court of Appeals.

[2]The record below is entirely consistent with the published literature that has universally found the extensive correlation between expert testimony and judicial dispositions when one's mental health is at issue. *See e.g.,* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law,* 51 So. Cal. L. Rev. 527, 536 n.16 1978); Slobogin, *Dangerousness and Expertise,* 133 U. Pa. L. Rev. 97, 147 n.182 (1984).

of other circuits in proceedings in the context of the insanity defense. When a criminal defendant raises the insanity defense, a court must appoint an expert "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. In this role,

> [P]sychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior. . .They know the probative questions to ask the opposing party's psychiatrists and how to interpret their answers. . . . [P]sychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.

470 U.S. at 80. The Second Circuit referred to this type of expert as a consulting psychiatrist and an expert whose sole function is to provide testimony about a patient as an independent psychiatrist. *Goetz v. Crosson,* 967 F. 2d 29, 34-36 (2d Cir. 1992).

An independent psychiatrist who is responsible to the court rather than to the patient cannot perform the functions required by this Court in *Ake*. *See United States v. Sloan,* 776 F. 2d 926, 929 (10th Cir. 1985) ("essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared

with the prosecution"); *Smith v. McCormick,* 914 F. 2d 1153, 1157 (9th Cir. 1990) (right to psychiatric assistance involves opportunity to use psychiatrist in whatever role counsel deems appropriate). Accordingly, reliance on an expert whose function is to provide only testimony for either side places indigents at a severe disadvantage in the adversarial system because they lack the resources to participate in a "battle of the experts." Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases,* 41 Hastings L. J. 281, 348 (1990).

The issues raised by the petitioners are not limited to only New York State. Rather, a survey of the applicable laws reveals that most states do not provide psychiatric assistance to indigent civilly committed patients. Only three states provide as of right for a psychiatric expert who serves to assist the patient in his case.[3] Fifteen states provide as of right for an evaluation by an expert who is available only to testify at the hearing.[4] In the remaining states, discretion for the appointment of an expert who will serve only as a witness rests with the court or there are no provisions for any appointment of a expert upon

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[3]NEB. REV. STAT. § 83-1052 (1994); N.M. STAT. ANN. § 43-1-11 (1993); S.D. CODIFIED LAWS ANN. § 27A-11A-9 (1992).

[4]ALASKA STAT. § 47.30.745(e) (1994); ARIZ. REV. STAT. ANN. §§ 36-505, 36-538 (1993); DEL. CODE ANN. tit. 16, § 5006 (1983); FLA. STAT. ANN. § 394.467(3)(a) (1993); IOWA CODE ANN. § 229.10 (WEST 1994); KY. REV. STAT. ANN. § 202a.066 (Michie/Bobbs-Merrill 1991); MICH. COMP. LAWS ANN. § 330.1463 (West 1992); MINN. STAT. ANN. § 253B.07(3) (West 1994); MONT. ANN. STAT. § 53-21-118 (1993); MO. ANN. STAT. § 632.345 (Vernon 1988); N.D. CENT. CODE § ANN. § 5122.15 (4) (Anderson 1993); OHIO REV. CODE ANN. § 5122.15(4); R.I. GEN. LAWS § 40-1-5-8(6) (1990); VA. CODE ANN. §31.1-67.3 (1990 and Supp. 1995); VT. STAT. ANN. tit. 18 § 7613 (1987) : W. VA. CODE § 27-5-4 (g) (3) 1992).

the request of an indigent civil patient.[5]

In holding that due process does not require the provision of psychiatric assistance as of right, the Second Circuit reasoned that civil commitment hearings are not entirely adverse, *Goetz v. Crosson,* 967 F. 2d at 34-35, a premise that flies in the face of case law from this Court. If, as this Court has held, a paternity suit is "quasi-criminal" in nature because state involvement undeniably pervades the proceeding, *Little v. Streater,* 452 U.S. 1, 9 (1981), then a civil commitment hearing in which the subject faces a loss of liberty, is certainly "quasi-criminal" and hence, adversarial. As one authority has recognized,

> [T]he fundamental penalty paid by convicted criminals has its source not in the actual routine inside the prison, but in their loss of personal liberty, a loss endured by those committed to mental hospitals no less than by those imprisoned. Thus, even if one were to receive excellent care in a hospital, the erroneously committed person suffers no less a loss of liberty than the unjustly convicted

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[5]The following statutory provisions permit, but do not require, a court to appoint an independent expert: COLO. REV. STAT § 27-10-111(2) (1989 and Supp. 1994); GA. CODE ANN. § 37-3-81(4) (Harrison 1982); HAW. REV. STAT. § 334-60.5(h) (Harrison 1982); ILL. ANN. STAT. Ch 5/3-804 (Smith-Hurd 1993); LA. REV. STAT. § 28:54(2) (West 1994) MASS. GEN. LAWS ANN. Ch. 123, § 5 (West 1986 and Supp. 1995); S.C. CODE ANN. § 44-17-530 (Law Co-op 1985 and Supp. 1992); TEXAS HEALTH & SAFETY CODE ANN. § 574.010 (Vernon 1992). *Amici* have been unable to uncover statutory provisions in other jurisdictions, if any such provisions exist.

individual.

Note, "The Role of Counsel in the Civil Commitment Process: A Theoretical Framework" in D.B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* 309, 314 (1990). Moreover, like a criminal defendant, not only does a civil committee face a loss of liberty, but also the stigma that attaches to a finding of mental illness and dangerousness. *See Addington v. Texas,* 441 U.S. at 425.

Indeed, a civil committee often faces greater deprivations than does the criminal defendant. First, a civil patient is liable for the cost of hospitalization. *Goetz v. Crosson,* 967 F. 2d at 33. Moreover, the civil patient faces a far greater deprivation of liberty than does the criminal defendant who raises the insanity defense. A criminal defendant who successfully raises the insanity defense will still suffer a deprivation of liberty. The state will simply confine him in a psychiatric hospital instead of a jail.[6] On the other hand, a successful civil committee wins his outright release.

The quasi-criminal nature of commitment proceedings can also be evidenced by an examination of the function of the civil commitment process. The purposes of a civil commitment proceeding parallel those of criminal punishment. It is well-settled that the civil

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[6]If Mr. Ake successfully asserted the insanity defense he would have faced automatic commitment pursuant to OKLA. STAT. tit. 22 § 925 (1986). New York subjects insanity acquittees to automatic commitment pursuant to NEW YORK CRIMINAL PROCEDURE LAW § 330.20(3) (McKinney 1986).

commitment process is designed to facilitate the provision of treatment for mentally ill individuals deemed to require in-patient treatment and protect society and the patient from the potential dangerousness of such people. *See Jones v. United States,* 463 U.S. 354, 368 (1983). Likewise, criminal punishment serves to eliminate future criminal acts by, *inter alia*, confinement and rehabilitation. Torcia, I *Wharton's Criminal Law,* § 1 at 2-3 (14th ed. 1978). By accepting in the name of treatment less procedural protections that one may ordinarily expect, the Second Circuit continued countenance the use of unchallenged psychiatric testimony to dominate the commitment process. As detailed below, such an approach is ill advised.

DUE PROCESS REQUIRES THE APPOINTMENT OF A PSYCHIATRICT EXPERT SO THAT A COURT DOES NOT RELY SOLELY ON THE POTENTIALLY UNRELIABLE TESTIMONY OF ONE EXPERT.

This Court has recognized, when one's mental status and dangerousness is at issue, the provision of expert assistance "so dramatically enhance[s]" the potential accuracy of the factfinder's determination. *Ake v. Oklahoma,* 470 U.S. at 83. Providing a patient with a psychiatric expert who will help an attorney probe and dissect adverse psychiatric testimony will likely result in the attorney effectively challenging weaknesses in adverse expert testimony. *See Ake*, 470 U.S. at 82-83. This should result in courts scrutinizing more carefully, and ceasing to accept without reservation, individual psychiatric testimony. As a result, courts will no longer render

decisions that are tied so directly to the unchallenged conclusions of a psychiatric expert. JA-577.

Careful scrutiny of psychiatric testimony is necessary because individual psychiatric diagnoses may be unreliable. Underlying courts' routine acceptance of the conclusions of the psychiatric expert, *see supra* at 3, is the assumption that psychiatrists can accurately diagnose and predict future dangerousness. However, this Court has recognized that "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, or the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma,* 470 U.S. at 81. Indeed, it was just this lack of certainty regarding psychiatric diagnoses that led this Court to hold that due process requires the imposition of the clear and convincing standard of proof at commitment hearings because "there is serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas,* 441 U.S. at 429.

Even under ideal conditions, psychiatrists have been found to agree on diagnoses on only thirty-two to forty percent of the time. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 692, 704 (1974); *see also* Lipton & Simon, *Psychiatric Diagnosis in a State Hospital: Manhattan State Revisited,* 36 Hosp. & Comm. Psych. 368, 370, 372 (1985) (at one New York State facility, psychiatrists incorrectly diagnosed seventy-three out of eighty-nine patients as schizophrenic, a diagnosis

that can carry an incorrect prognosis for long-term hospitalization). Further, an examination of the record reveals that the conditions under which psychiatrists examine class members and testify at commitment hearings are as far from ideal as conditions could possibly be. The committing hospitals utilize the services of one doctor who does not treat the patients about whom he testifies. Rather, his job is to examine patients about whom a decision has been made previously to confine, in order to gather evidence which he could use at trial to substantiate the need for hospitalization. *See* JA-537-38.

The inability of psychiatrists to predict dangerousness is even more pronounced. The American Psychiatric Association has recognized that the unreliability of psychiatric predictions of dangerousness is an accepted fact within the profession and when predicting violence, dangerousness or suicide, psychiatrists are far more likely to be wrong than right. *Barefoot v. Estelle,* 463 U.S. 880, 920-21 (1983) (Blackman, J. dissenting). The psychiatric profession has recognized that,

> Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or "dangerousness." Neither has any special psychiatric "expertise" in this area been established.

Clinical Aspects of the Violent Individual, American Psychiatric Association Task Force Report 28 (1974).

There are many reasons why psychiatrists often err when assessing an individual's dangerousness. For one, a psychiatrist will never learn about an incorrect prediction

of violence, but will always learn about an incorrect prediction of nonviolence. Ennis & Litwack, *supra* at 712, n.57. Thus, a psychiatrist will receive severe criticism if he incorrectly predicts nonviolence, but no consequences result from an incorrect prediction of dangerousness. Diamond, *The Psychiatric Prediction of Dangerousness,* 123 U. Pa. L. Rev. 439, 447 (1974). Finally, a psychiatrist's background does not train him to make such predictions. A typical mental health professional is concerned with diagnosing and treating mental illness, skills that are of limited utility in evaluating dangerousness. Slobogin, *supra* at 129.

Finally, the provision of a psychiatric expert as of right is needed to ensure that psychiatric hospitals do not eviscerate due process rights through uncontroverted psychiatric testimony. Although this Court has held that substantive due process prohibits the confinement of a nondangerous mentally ill individual, *see O'Connor v. Donaldson,* 422 U.S. 563, 576 (1975); *Jones v. United States,* 463 U.S. 354, 368 (1983), numerous commentators have recognized that incorrect psychiatric predictions of dangerousness are often a function of a desire to provide care and treatment to individuals deemed mentally ill. *See e.g.,* Mulvey & Lidz, *Back to Basics: A Critical Analysis of Dangerousness Research in a New Legal Environment,* 9 L. & Human Behav. 209, 214 (1985). Although a state must prove dangerousness, frequently, "the literal meaning of dangerousness is admittedly ignored in favor of the best interests of the patient, *i.e.,* whether he will benefit from treatment." Wexler & Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona,* 13 Ariz. L. Rev. 1, 100 (1971). Another authority has found that

> [I]f the ticket to involuntary treatment is a prediction of violence, many psychiatrists and psychologists are willing to punch it (Monahan & Cummings 1975), regardless of whether they actually believe the patient to be violence-prone. The organizational contingencies operating upon mental health professions to keep patients who are believed to "need" treatment, whether violent or not, may be intense.

Monahan, *The Clinical Prediction of Violent Behavior* 51, National Institute of Mental Health Monograph (1981).

It is well-settled that due process is measured by fundamental fairness. *See e.g., McKeiver v. Pennsylvania,* 403 U.S. 528, 543 (1971). Fundamental fairness demands that civil committees have access to their own expert to combat otherwise uncontroverted and highly influential expert testimony whose accuracy may be questionable.

THE NEED TO CLARIFY DUE PROCESS PRINCIPLES APPLICABLE TO CIVIL COMMITMENT PROCEEDINGS WARRANTS THE GRANTING OF *CERTIORARI.*

The unique nature of a civil commitment hearing warrants the granting of *certiorari* in order to set forth guidelines for lower courts to follow when applying due process principles to commitment hearings. On one hand, this Court has recognized the "massive curtailment of

liberty" that civil commitment entails. *Vitek v. Jones,* 445 U.S. 480, 491-92 (1980) quoting *Humphrey v. Cady,* 405 U.S. 504, 509 (1972). A number of lower courts have emphasized this deprivation of liberty to impose stringent procedural protections for civil committees. *See e.g., Doremus v. Farrell,* 407 F. Supp. 509 (D. Neb. 1975) (three-judge court); *Kendall v. True,* 391 F. Supp. 413 (W.D. Ky. 1975) (three-judge court); *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court).

On the other hand, this Court has stated that "[u]nlike a delinquency proceeding. . . a civil commitment can in no sense be equated to a criminal prosecution." *Addington v. Texas,* 441 U.S. at 428. As such, a number of lower courts, including the Court of Appeals in this proceeding, have emphasized the medical nature of the commitment hearing to justify with dispensing of procedural protections that might otherwise be required by the Fourteenth Amendment. *See e.g., Goetz v. Crosson,* 967 F. 2d at 34-35; *Project Release v. Prevost,* 722 F. 2d 960, 974-75 (2d Cir. 1983); *French v. Blackburn,* 428 F. Supp. 1351, 1355 (M.D.N.C. 1977) (three-judge court), *aff'd mem.,* 443 U.S. 901 (1979); *Logan v. Arafeh,* 346 F. Supp. 1265, 1269 (D. Conn. 1972), *aff'd mem. sub nom. Briggs v. Arafeh,* 411 U.S. 911 (1973).

These cases illustrate the *sui generis* nature of civil commitment hearings. On one hand, as in criminal and delinquency proceedings, a patient loses his liberty. On the other hand, states involuntarily hospitalize patients in order to provide a benefit to the patient in the form of necessary care and treatment. Under these circumstances, one would have expected a detailed body of case law from

this Court delineating the procedural protections required in a civil commitment hearing. Not only do no such cases exist, but, as the petitioners point out in their *certiorari* petition, there are no cases setting forth the appropriate framework for due process analysis.

One can contrast the absence of procedural due process cases for civilly committed adults[7] with case law for juveniles facing confinement in delinquency hearings and adults facing incarceration in sexual delinquency proceedings. *See e.g., In re Gault,* 387 U.S. 1 (1967) (provision of notice and counsel in, and applicability of privilege against self incrimination to, delinquency proceedings); *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971) (no right to jury trial in delinquency hearings); *Specht v. Patterson,* 386 U.S. 605, 610-11 (1967) (right to notice, counsel and cross-examination of witnesses in sexual delinquency proceedings); *Allen v. Illinois,* 478 U.S. 364 (1986) (privilege against self-incrimination not applicable to sexual delinquency hearing).

The absence of definitive case law from this Court pertaining to the civil commitment process is particularly troubling in light of a number of pronouncements from this Court which have provided conflicting messages for the lower courts. To date, *Addington v. Texas* is the only case from this Court to address procedural due process issue. However, *Addington* involved the question of the standard of proof in a commitment hearing, which serves to allocate the risk of error in the proceeding. 441 U.S.

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[7] In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court addressed the scope of procedural protections the state must provide when a parent commits a child under a state's minor voluntary commitment provisions.

at 423. Accordingly, it is understandable that this Court would address the harm resulting not only from an erroneous confinement but also a wrongful release. *See* 441 U.S. at 429 ("[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma"). The Second Circuit relied upon this language to hold that commitment proceedings are not entirely adverse. *See* 967 F. 2d at 34-35. However, this Court in *Addington* also held that "an erroneous commitment is sometimes as undesirable as an erroneous conviction. . .[and]. . .should be avoided in the first instance." 429 U.S. at 428. This was a relevant consideration in *Addington* because the erroneous failure to commit as a result of an unduly high standard of proof could harm the subject of the commitment hearing. No potential harm to a patient occurs when requiring the provision of expert assistance because the appointment of an expert can only enhance the accuracy of the proceeding.

Other case law from this Court strongly suggests that a court should consider civil commitment hearings to be completely adversarial and require stringent procedural protections. This Court has frequently recognized the severe nature of a loss of physical liberty. *See e.g., In re Gault,* 387 U.S. at 36 (proceeding where child will be found delinquent and subjected to loss of liberty comparable in seriousness to a felony prosecution); *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981) (right to counsel presumptively attaches only when individual suffers a loss of liberty). Moreover, an individual found to be in need of involuntary hospitalization suffers the same consequences as a convicted criminal who has been jailed - the loss of liberty

and the imposition of stigma that results from society labeling such individuals either "criminal" or "mentally ill" and "dangerous." *See In re Winship,* 397 U.S. 358, 363 (1970); *Addington v. Texas,* 441 U.S. at 425-26.

The provision of treatment does not justify dispensing with procedural protections for the mentally ill. Like a civil committee, both the convicted criminal and the juvenile delinquent receive rehabilitative measures while confined. *See Addington v. Texas,* 441 U.S. at 425-26; *McKeiver v. Pennsylvania,* 403 U.S. at 552 (White, J. concurring); *Morrissey v. Brewer,* 408 U.S. 471, 484 (1972). Under these circumstances, only the finding of blameworthiness, implicit in a criminal conviction, *see McKeiver v. Pennsylvania,* 403 U.S. at 551-53 (White, J. concurring), is the distinguishing factor that appears to be the justification for the elimination of procedural protections for the mentally ill. This is a very slim reed upon which to reduce due process protections. Indeed, any decision to justify reduced procedural safeguards on the ground that the government is acting in the best interest of the individual must be "candidly appraised" and is particularly troubling in "light of the wide divergence of medical opinion regarding the diagnosis and proper therapy for mental abnormalities." *O'Connor v. Donaldson,* 422 U.S. at 586-87 (1975) (Burger, C.J. concurring).

Perhaps even more significantly, this justification for lessening procedural protections rests upon the assumption that every person subject to the commitment process suffers from some disability and will benefit from treatment whether or not he satisfies the civil commitment criteria. In other words, the justification for reduced

criteria. In other words, the justification for reduced procedural protections begs the issue at hand because it assumes that every person facing involuntary hospitalization will benefit from treatment. This case provides this Court with an opportunity to correct this leap of logic by developing a framework by which lower courts are to measure procedural protections that a state must provide to civilly committed individuals.

CONCLUSION

For the reasons given, this Court should issue a writ of *certiorari* to review the opinions of the Second Circuit.

Dated: Islandia, New York
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No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and ANNA SELLETTI, on behalf of themselves and all other similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON, in his official capacity of chief administrator of the courts of New York, and DR. RICHARD C. SURLES, in his official capacity of Commissioner of the New York State Office of Mental Health.

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

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PRELIMINARY STATEMENT

This brief responds to the brief in opposition filed by the respondents. The absence of a conflict among the courts of appeals, in and of itself, hardly warrants a denial of *certiorari*. In almost every case involving the constitutional rights of

institutionalized mentally disabled individuals pertaining to their confinement in which this Court granted *certiorari*, there was no conflict among the circuits. *See, Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 1979); *Parham v. J.R.*, 442 U.S. 584 (1979); *Jones v. United States*, 463 U.S. 354 (1983); *Allen v. Illinois*, 478 U.S. 364 (1986); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Heller v. Doe by Doe*, _U.S. _, 113 S.Ct. 2637 (1993).[1] As in those cases, the issues presented by the petitioners are important and deserve plenary review by this Court.[2]

REASONS FOR GRANTING THE WRIT

THE CRITICAL ROLE PLAYED BY PSYCHIATRISTS IN THE COMMITMENT PROCESS WARRANTS A DETERMINATION OF WHETHER DUE PROCESS REQUIRES THE APPOINTMENT OF A PSYCHIATRIC EXPERT AS OF RIGHT.

This Court has recognized that psychiatrists are a necessity in the civil commitment process. *See Addington v. Texas*, 441 U.S. at 429 (psychiatrists and psychologists *"must"* interpret facts in commitment hearing) (emphasis added). Yet

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[1]Only in *Zinnermon v. Burch*, 494 U.S. 113 (1990) was there a conflict among the circuits. Such conflict existed with the issue of the applicability of *Parratt v. Taylor*, 451 U.S. 527 (1981), to deprivations effected by state officials who had the authority to provide predeprivation process. 494 U.S. at 116-117.

[2]In their brief in opposition, the respondents take pains to detail the status of the named petitioners. Because the district court certified this lawsuit as a class action (76a), the status of the named petitioners is irrelevant. *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). However, it is worth noting that Lyle Goetz, who filed this lawsuit in 1988, remains confined. Mark Cans and Anna Selletti, who moved to intervene in 1989, remained confined until 1994 and 1993 respectively.

the Second Circuit found that a patient must first establish that the appointment of an expert is necessary for a reliable determination of a proceeding before a court is required to appoint an expert. Petition for *Certiorari* 29a.

The respondents' attempt to distinguish *Ake v. Oklahoma*, 470 U.S. 68 (1985), simply highlights the necessity of review by this Court. In *Ake*, this Court recognized that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or *liberty* at risk is almost uniquely compelling." 470 U.S. at 78 (emphasis added). The respondents offer no reason why the liberty of someone erroneously confined to a psychiatric hospital is any less compelling than that of a criminal defendant who faces incarceration.[3] This *certiorari* petition provides this Court with an opportunity to determine whether the layers of review in the commitment process, *Addington v. Texas*, 441 U.S. at 428-429, warrant the provision of significantly less protection to civil committees than that afforded to criminal defendants who raise the insanity defense.

While due process does not require that civil committees be provided with all the procedural protections that are afforded to criminal defendants, *see, Addington v. Texas*, 441 U.S. at 428, the respondents erroneously seize upon this distinction to argue that none of the protections in a criminal proceeding pertain to the civil commitment process. Respondent's Brief in Opposition at 7. Certainly, due process requires the provision of some procedural protections that criminal defendants enjoy. *See, Addington v. Texas*, 441 U.S.

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[3]Indeed, while *Ake* involved the provision of expert assistance to a defendant facing the death penalty, the courts of appeals have universally held that the requirements of *Ake* apply to any defendant facing a deprivation of liberty. *See, e.g., United States v. Sloan*, 776 F. 2d 926, 928-29 (10th Cir. 1985); *United States v. Crews*, 781 F. 2d 826, 833-34 (10th Cir. 1986); *Dunn v. Roberts*, 963 F. 2d 308, 314 (10th Cir. 1992).

at 427 ("individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence"). The respondents cannot cite one case in which this Court addressed the provision of a procedural protection designed to enhance the accuracy of the commitment process, which is a component of procedural due process that is to be weighed against countervailing factors.

Furthermore, because *Addington v. Texas* addressed the appropriate standard of proof in a civil commitment hearing, which involves an allocation of the risk of error, 441 U.S. at 423, the availability of layers of review to correct errors in the commitment process does not itself justify dispensing with procedural protections that enhance the accuracy of the determination at hand. Rather, "an erroneous confinement should be avoided in the first instance." 441 U.S. at 428. Accordingly, when assessing the provision of expert assistance that is designed to enhance the accuracy of the commitment process, it is not relevant that it may not be much better to erroneously release a mentally ill individual than it is to wrongfully confine a mentally normal person.

The respondents' attempt to rely upon *County of Riverside v. McLaughlin*, 500 U.S. at 44 to minimize the legal significance of requiring petitioners to wait six weeks for a constitutionally acceptable hearing is equally unavailing. Apparently, the respondents believe that the "practical realities" that require a substantial degree of flexibility in a state's commitment procedures permit New York to delay commitment proceedings as much as six weeks. *See* Petition for *Certiorari* 5a. However, "flexibility has its limits." *County of Riverside v. McLaughlin*, 500 U.S. at 55. As such, this Court held that probable cause hearings are presumptively invalid if held more than forty-eight hours after arrest. 500 U.S. at 56-57.

Hence, *certiorari* is warranted to determine at what

point delays in the commitment process render the hearings presumptively invalid. At least nine lower courts have addressed the issue of how promptly a state must provide a civil committee with the opportunity to challenge his confinement. *See*, Petition for *Certiorari* at 22-23 (and cases cited therein). The opinions reached by these courts vary significantly. *See, e.g., Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. (1975) (three-judge court) (hearing required within fourteen days); *Logan v. Arafeh*, 346 F. Supp. 1265, 1268-69 (D. Conn. 1972), (three-judge court) *aff'd. sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973) (hearing within forty-five days permissible). The significant differences in the lower court decisions further highlight the appropriateness of granting plenary review. Contrary to the assertions of the respondent, this case will have as much impact beyond Dutchess County as this Court's decision in *County of Riverside v. McLaughlin* had upon other counties who required defendants to wait more than forty-eight hours for a probable cause hearing.

Accordingly, the respondents fail in their attempts to characterize this lawsuit as an unremarkable case which contains issues that impact upon only Dutchess County, New York. Rarely, if ever, has this Court had the opportunity to address two issues that are so critical to the civil commitment process: the right of civil committees to what is a necessity in the commitment process -access to psychiatric assistance; and, the amount of time that a state may confine a civil committee before providing him with a constitutionally acceptable hearing. The latter issue also enables this Court to address the principles of *County of Riverside v. McLaughlin*, 500 U.S. at 44, in the civil commitment context. Either issue alone merits the granting of *certiorari*. Together, they provide this Court with a unique opportunity to significantly clarify the rights of individuals facing the "massive curtailment of liberty" that civil commitment entails. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980).

CONCLUSION

For the reasons given in this brief and the petition for *certiorari*, this Court should grant the petition for a writ of *certiorari*.

Dated: August 28, 1995
Huntington, New York

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